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

APPELLANTS' REPLY BRIEF

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SETH P. WAXMAN*
DANIEL S. VOLCHOK*
CHRISTOPHER E. BABBITT*
JOSEPH M. MEYER*
JANE E. KESSNER*
NITISHA BARONIA*
WILMER CUTLER PICKERING
HALE AND DORR LLP
2100 Pennsylvania Avenue N.W.
Washington, D.C. 20037
(202) 663-6000

**Pro hac vice*

WILLIAM E. CHRISTIE
(N.H. Bar #11255)
SHAHEEN & GORDON, P.A.
107 Storrs Street
Concord, N.H. 03302
(603) 617-3029

Oral Argument: Seth P. Waxman

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INTRODUCTION

Neither response brief offers a sound basis to affirm the dismissal of plaintiffs' claim that S.B. 418 violates part 2, article 32 of the state constitution. No party defends the superior court's reasoning, which is foreclosed by this Court's precedent. And the arguments offered instead fare no better; they depend on mischaracterizations (already debunked in plaintiffs' opening brief) of S.B. 418 and the constitution. There simply is no way around the "clear and substantial conflict," *New Hampshire Democratic Party v. Secretary of State*, 174 N.H. 312, 321 (2021) ("*NHDP*"), between S.B. 418 and article 32.

Seemingly recognizing this, intervenors urge this Court to abandon the *NHDP* standard, hold that article 32 was not properly ratified, or sever S.B. 418's offending provisions. Each argument is both waived and meritless: The first offends stare decisis, the second would have this Court usurp the people's will, and the third would require it to legislate. Intervenors' remaining argument, meanwhile—that plaintiffs cannot enforce article 32 through the declaratory-judgment statute—contradicts this Court's cases and its longstanding recognition of the public's interest in article 32.

Defendants and intervenors also cannot justify the denial of a preliminary injunction. Defendants do not dispute that plaintiffs demonstrated an immediate threat of irreparable harm. Intervenors' arguments misstate the record and law, and fail to engage with plaintiffs' opening brief.

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Finally, defendants provide no valid attack on either basis for standing—organizational and representational—the superior court accepted. Defendants misconstrue plaintiffs' claim and espouse improper barriers to justice this Court has never imposed.

ARGUMENT

I. DEFENDANTS' AND INTERVENORS' MERITS ARGUMENTS FAIL

As plaintiffs explained (Opening Br. ("OB") 24-26), S.B. 418 clearly and substantially conflicts with the constitution because it defers until *seven* days after an election what the constitution requires within *five* days: a tally of the votes cast by persons "qualified to vote," N.H. Const. pt. 2, art. 32. Defendants and intervenors advance no good reason for this Court to abandon its clear-and-substantial-conflict test, nor any way to avoid the conflict here.

A. The Clear-And-Substantial-Conflict Test Should Not Be Abandoned

1. Neither defendants nor intervenors endorse the superior court's reason for upholding S.B. 418: that there could theoretically be elections in which there are no affidavit-ballot voters or all such voters establish their qualifications at least two days before S.B. 418's deadline, such that election officials could comply with both S.B. 418 and the constitution, *see* OB.Add.56. The refusal to defend that reasoning is unsurprising; as explained (OB.26-27), this Court has disavowed the superior court's "no set of circumstances" test, holding that the test for

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facial unconstitutionality is whether "a clear and substantial conflict exists between [a statute] and the constitution," *NHDP*, 174 N.H. at 321.

2. This Court should decline intervenors' invitation (Br.21) to "limit" or "abandon" *NHDP*. For starters, overruling *NHDP* "was not raised below and is, therefore, waived." *Provencher v. Buzzell-Plourde Associates*, 142 N.H. 848, 857 (1998).

Intervenors' argument also lacks merit. Intervenors contend (Br.21 n.1) that *NHDP* is infirm after *Borden v. United States*, 593 U.S. 420 (2021), and *United States v. Rahimi*, 144 S.Ct. 1889 (2024). But *Borden* never endorsed a "no set of circumstances" test; it relied on a case that *declined* to apply that test. *See* 593 U.S. at 424 (plurality); *see also id*. at 448 (Thomas, J., concurring). Nor does *Rahimi* require courts to uphold a statute whenever a court can "conjure up hypothetical situations in which application of the statute might be valid," *NHDP*, 174 N.H. at 324. In *Rahimi*, the challenged "provision [was] constitutional as applied to … Rahimi's *own case*," 144 S.Ct. at 1898 (emphasis added).

Intervenors' argument for overruling *NHDP*—which never even mentions this Court's stare-decisis factors, *see Union Leader Corporation v. Town of Salem,* 173 N.H. 345, 352 (2020)—otherwise reduces to a contention (Br.21-22) that non-severable statutory provisions should be allowed to "ever so slightly transgress[] … concrete constitutional limitation[s]." That is anathema to the rule of law.

3. Lacking any basis for overruling this Court's facial-unconstitutionality standard, intervenors (Br.21) misstate it as whether a

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challenged statute "is in clear and substantial conflict with the relevant constitutional test," and argue that standard is not met because "plaintiffs do not identify the constitutional test relevant to a challenge based on Article 32." But the standard is *not* as intervenors phrase it (whatever that phrasing means), but whether "a clear and substantial conflict exists between [the statute] and *the constitution*," *American Federation of Teachers v. State*, 167 N.H. 294, 300 (2015) (emphasis added). As explained in plaintiffs' opening brief (OB.24-26) and below, such a conflict exists here.

B. Defendants' And Intervenors' Arguments That There Is No "Clear And Substantial Conflict" Here Are Meritless

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The conflict between S.B. 418 and article 32 is so obvious (OB.24-26) that defendants and intervenors can deny it only by mischaracterizing the statute and constitution—mischaracterizations plaintiffs have already debunked—and by mischaracterizing plaintiffs' arguments.

For instance, defendants attack a straw man in claiming (Br.18) that plaintiffs "interpret … Article 32 as prohibiting election results from being adjusted more than five days after an election." But as plaintiffs explained, what article 32 requires within five days is "*not* a conclusive election result," OB.29 (emphasis added), but a tally of votes cast by those "qualified to vote," N.H. Const. pt. 2, art. 32. Defendants' paraphrasing of article 32 (Br.25) glosses over this requirement—with which S.B. 418 conflicts, by deferring until *seven* days after an election the determination of who was "unqualified," S.B. 418 §2, V. Plaintiffs have likewise

explained (OB.30) why the recount procedures defendants cite (Br.25-26) create no such conflict.

Intervenors, meanwhile, misrepresent S.B. 418. For example, they claim (Br.17) that under S.B. 418, "[a]ffidavit ballot voters are presumptively qualified to vote." That is backwards (OB.25-26): Affidavit-ballot voters are deemed unqualified (and their votes excluded) unless they follow-up with proof of their qualifications; hence, they are presumptively *un*qualified. "[T]he fact that they are permitted to cast ballots" (Intervenors' Br.17) does not prove they are presumptively qualified to *vote*. Voting entails not just "cast[ing] a ballot," but also "hav[ing] it counted." *United States v. Classic*, 313 U.S. 299, 318 (1941).

Intervenors' argument that S.B. 418 addresses "the qualification of the ballot … and not … of the person who cast it" (Br.18) is wrong for the same reason. If someone's ballot is unqualified, that person is not a qualified voter, because "qualified voters" are entitled "to cast their ballots and have them counted," *Reynolds v. Sims*, 377 U.S. 533, 555 (1964). In any event, intervenors acknowledge (Br.18) that S.B. 418 classifies affidavit-ballot voters who fail to timely prove their qualifications as "unqualified *voters*," S.B. 418 §2, VI (emphasis added), but fail to square that with their argument.

Intervenors' remaining arguments are likewise infirm. They claim (Br.17-18) that the tally article 32 requires may "includ[e] ballots from unqualified voters as well as … qualified voters" because "overinclusive tallies are of no constitutional moment." That (unsupported) argument is

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self-evidently wrong: A tally of votes cast by qualified *and unqualified* voters is not a tally of votes cast by those "qualified to vote," N.H. Const. pt. 2, art. 32, just as a tally of votes for all candidates in an election is not the same as a tally of votes for any particular candidate. In both cases, the former (overinclusive) tally conveys information different than the latter.

Intervenors next say (Br.18, 20) that if New Hampshire's recount procedures do not violate article 32, S.B. 418 must not either. But as plaintiffs explained (OB.30), recounts—*unlike* S.B. 418's affidavit-ballot process—do not involve assessing voter qualifications or removing ballots from the tally; recounts serve merely to ensure that votes were accurately tallied. Intervenors make the remarkable claim (Br.20) that the grounds for challenging a ballot during a recount are "unlimited," such that "voter-qualification-based challenges" are permitted. That too is wrong. State law provides for voter-qualification challenges *before* ballots are cast, RSA 659:27-659:32, not after. Because "the legislature knew how to provide for" voter-qualification challenges, its choice not to do so in the recount context "is a strong indication that the legislature did not intend" for such recount challenges. *Barry v. Town of Amherst*, 121 N.H. 335, 339 (1981).

C. Intervenors' *Fischer* Argument Is Waived And Incorrect

Intervenors contend (Br.22) that "Article 32 was not properly ratified." This argument is waived because it was not raised below, and also meritless. Contrary to intervenors' claim (Br.25), the ballot language presented to voters to ratify the current version of article 32 does not suffer from "[t]he same failure identified in *Fischer*" *v. Governor*, 145 N.H. 28

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(2000). *Fischer* required “inescapable grounds” to overcome the “presumption … of the validity of an [already-ratified] amendment to the Constitution,” adding that “the question submitted to the electorate need not inform it of the details nor full import of the proposed amendment.” 145 N.H. at 37. The ballot language *Fischer* assessed provided “inescapable grounds” because it failed to notify voters that the proposed amendment would “completely eradicate” the legislature’s “longstanding and well-established authority … to define voter qualifications.” *Id.* at 38. By contrast, the ballot language intervenors criticize did not surreptitiously effect “an indisputably significant and substantial change” to New Hampshire’s “constitutional parameters.” *Id.* It did not reallocate any rights or obligations; it merely effected a timing change, shortening article 32’s deadline from twenty days after an election to five. That does not come close to the requisite “inescapable grounds.”

II. PLAINTIFFS MAY ENFORCE ARTICLE 32 THROUGH THE DECLARATORY-JUDGMENT STATUTE

Intervenors argue (Br.13-16) that plaintiffs lack an interest in article 32 enforceable through the declaratory-judgment statute. That argument rests on intervenors’ assertion (Br.14) that article 32 provides for its required tally to be “transmitted … to the secretary of state—not to the public.” But article 32 mandates *both* transmission to the secretary and a “public declaration” of the required tally. Furthermore, because the tally that must be transmitted “to the secretary” within “five days,” N.H. Const. pt. 2, art. 32, is “ma[d]e … according to [the] public declaration,” *Bell v.*

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Pike, 53 N.H. 473, 473 (1873), the declaration must itself occur within five days. As this Court has explained, "the framers of the constitution … relied" on the prompt "publicity of the declaration" to "all … who may take an interest in the election"—which assuredly includes political parties—so that they may "detect and expose any error … when it can be most easily corrected," *In re Opinion of Justices*, 53 N.H. 640, 643 (1873); *see* OB.33-34. This Court has thus already recognized plaintiffs' interest in the enforcement of article 32. That renders irrelevant intervenors' concern (Br.15) about "throw[ing] open the courthouse doors" to constitutional enforcement suits by "all manner of claimants" with*out* any pertinent interest.

As plaintiffs explained, moreover (OB.30-31), relief under the declaratory-judgment statute is "particularly appropriate" (and routinely awarded) in cases like this one, where "the constitutionality of a statute" is challenged and circumstances "require[] a speedy determination of important public interests," *Werme's Case*, 150 N.H. 351, 353 (2003). Intervenors offer no response.

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III. Intervenors' Severability Argument Is Waived And Incorrect

Intervenors' argument (Br.35-37) that 418's seven-day deadline can be severed is a non-starter. Yet again, this argument was not raised below and thus is waived. Regardless, the seven-day deadline is non-severable because without it, there would be no deadline for affidavit-ballot voters to verify their qualifications. That would cause "an entire collapse" of S.B.

418's affidavit-ballot scheme, *Associated Press v. State*, 153 N.H. 120, 141 (2005), as affidavit ballots could never be deducted from the vote total.

Recognizing this, intervenors invite this Court (Br.37) to change S.B. 418's seven-day cure period to "a five-day cure period." That "would be an act of legislation not of construction," *Claremont School District v. Governor*, 144 N.H. 210, 218 (1999), which lies beyond this Court's "institutional competence," *Ayotte v. Planned Parenthood of Northern New England*, 546 U.S. 320, 329 (2006). Intervenors' response (Br.37)—that the "policy choice" to "set[] the cure period at five days" has "already been made" by article 32—is unavailing. Article 32—last amended in 1976—reflects no policy choice about how to treat a type of ballot first introduced *last year*.

In any event, re-writing S.B. 418's deadline to five days would not solve the problem; that would leave no time to process documentation submitted on day five. This Court would thus have to set the deadline *before* five days—a quintessentially legislative action.

IV. DEFENDANTS AND INTERVENORS CANNOT JUSTIFY THE DENIAL OF A PRELIMINARY INJUNCTION

As plaintiffs explained (OB.31-36), the superior court erred in denying a preliminary injunction on plaintiffs' article 32 claim, based on an erroneous (1) merits analysis, and (2) conclusion that plaintiffs failed to demonstrate irreparable harm absent preliminary relief, OB.Add.62-63. Defendants do not dispute (Br.26) that plaintiffs showed immediately threatened irreparable harm. Intervenors' responses (Br.26-35) lack merit.

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Intervenors contend (Br.28-29) that plaintiffs cannot be harmed by S.B. 418 because plaintiffs do not vote, and their "members and candidates are already registered voters." But plaintiffs represent both registered voters *and* people "who would vote for Democrats in New Hampshire" upon registering, or who are otherwise "associated with" plaintiffs. OB.App.6-9; *accord* OB.App.217. Likewise, the DNC considers prospective voters who would vote for Democrats to be its members, even if they are not yet registered to vote. OB.App.209. And it is irrelevant that plaintiffs' candidates are registered voters (Br.29), since they are nonetheless harmed by disenfranchisement of non-registered Democrats.

Intervenors next repeatedly declare (Br.27-31)—without support—that any irreparable harm must stem from S.B. 418's violation of article 32. That too is wrong. As the superior court recognized, the inquiry is whether "absent preliminary relief, irreparable harm will result." OB.Add.63. It is immaterial whether that harm emanates from the ground on which the law is challenged. Because the seven-day deadline is non-severable, *supra* pp.12-13, preliminary relief would mean enjoining S.B. 418 entirely—not impermissibly "shortening the cure period" to five days (Br.27). The relevant question, therefore, is whether S.B. 418's enforcement threatens irreparable harm. It does, by disenfranchising voters and depriving the public of the timely vote tally that article 32 guarantees. OB.33-34.

Intervenors dismiss the irreparable harm of disenfranchisement as "rank speculation" (Br.27), but do not rebut plaintiffs' contrary arguments. For instance, New Hampshire courts do not require specific examples of

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disenfranchised voters or candidates. OB.34-35 (citing caselaw). In any event, plaintiffs *did* provide evidence of rejected affidavit ballots and an affected candidate. OB.35-36 (citing OB.App.211, 222).

As for S.B. 418's deprivation of the timely vote tally that article 32 requires, intervenors repeat their arguments (Br.30-31) that the statute does not delay tallies but only "renders them overinclusive," and that tallies are not transmitted to the public. Both contentions are wrong, *see supra* pp.8-10, 11-12, as is intervenors' assertion (Br.31) that "plaintiffs do not explain how any delay in election results might harm them." Plaintiffs explained (OB.33-34)—and intervenors never dispute—that the timely tally and declaration that article 32 guarantees enable interested parties to "detect and expose any error" early enough to "correct[]" it, *Opinion of Justices*, 53 N.H. at 643; *see supra* p.12. S.B. 418 thus undermines a core, longstanding mechanism for holding election officials accountable and ensuring correct election outcomes.

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Plaintiffs also explained (OB.34) that they (and candidates) must invest resources to educate voters about S.B. 418 and prepare for delayed disputes over which affidavit ballots count. Intervenors' response that these harms are not linked to article 32 (Br.30-31) is irrelevant as no such link is necessary, *see infra* p.19, and incorrect: When article 32 is enforced, plaintiffs need not wait longer than five days after an election to make resource-allocation decisions informed by a tally of the votes that will actually count in that election. Under S.B. 418, by contrast, plaintiffs must wait at least seven days (and up to "14 days," S.B. 418 §2, VI) before

making such informed decisions. Each day of delay taxes plaintiffs, especially in primary elections, which occur shortly before general elections such that any delay deprives candidates and parties of precious time to prepare for the general election. OB.App.277-278.

Finally, intervenors contend (Br.33-35) that because the superior court made no factual findings on plaintiffs' article 32 claim, plaintiffs cannot establish that those (non-existent) findings were untenable. That makes no sense. As intervenors concede (Br.33), "the 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) (emphasis added). Here, the superior court's irreparable-harm holding rested on its view that plaintiffs had to identify a "specifically named voter or candidate whose right to vote or be elected has been infringed by SB 418." OB.Add.62-63. That is a legal error. OB.34-35; *supra* pp.14-15. In any event, plaintiffs identified voters whose affidavit ballots were rejected and a candidate who was affected. OB.App.211, 222; *see supra* p.15. At bottom, then, intervenors' argument is that preliminary injunctions can *never* issue before discovery or formal evidentiary submissions. Intervenors provide no authority for that extreme proposition.

In addition to establishing irreparable harm, plaintiffs are correct on the merits, *see supra* pp.8-11, and neither defendants nor intervenors

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dispute that equity principles favor an injunction, OB.36. Accordingly, the district court erred in denying preliminary relief.

V. DEFENDANTS' STANDING ARGUMENTS ARE MERITLESS (CROSS-APPEAL ISSUE)

The superior court correctly recognized plaintiffs' standing to bring this suit, as organizations in their own right and separately as their members' representatives. OB.36-39. Defendants provide no sound reason to upset either ruling, let alone both.

Defendants contend (Br.19) that plaintiffs lack organizational standing because their interest in enforcing article 32 is "abstract." That recasts in standing terms intervenors' argument (Br.13-16) that plaintiffs lack any interest in article 32 enforceable under the declaratory-judgment statute. It fails for the same reason: This Court has long recognized that members of the public who, like plaintiffs, seek to hold election officials accountable and ensure correct election outcomes have a concrete stake in the timely tally required by article 32. *See supra* pp.11-12.

Defendants next attack (Br.21-23) the superior court's holding that plaintiffs' diversion of resources gives them organizational standing. That attack is refuted by this Court's affirmance of a decision that the New Hampshire Democratic Party had standing to challenge a voter-registration law due to the "diversion of time, talent, and resources" the new law would necessitate. *New Hampshire Democratic Party v. Gardner*, 2018 WL 5929044, at *3 (N.H. Super. Ct. Apr. 10, 2018), *aff'd*, *NHDP*, 174 N.H. 312. Contrary to defendants' suggestion (Br.23), *FDA v. Alliance for*

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Hippocratic Medicine, 602 U.S. 367 (2024), does not support a different outcome here. In fact, *FDA* recognizes that a plaintiff's diversion of resources *does* confer standing when the diversion "directly affect[s] and interfere[s] with" the plaintiff's "core business activities." *Id.* at 395. That is the situation here: The significant financial and human resources plaintiffs must expend to address S.B. 418 directly implicate, and interfere with, plaintiffs' core activity of supporting the election of Democrats. *See* OB.36-38; OB.App.208-214 (¶¶3-4, 7, 17-22), 216-221 (¶¶3-6, 12-16).

Finally, defendants attack plaintiffs' representative standing, arguing (Br.17) that plaintiffs may not invoke the declaratory-judgment statute "to vindicate the rights of third parties." *See also* Br.20-21. But nothing in that statute—which this Court has instructed "should not be restricted by a narrow interpretation of its scope," *Faulkner v. City of Keene*, 85 N.H. 147, 200 (1931)—supports that limitation. Nor does the only authority defendants cite, *Benson v. New Hampshire Insurance Guaranty Association*, 151 N.H. 590 (2004), held that a medical membership organization lacked standing to enforce "contractual obligations owed" by an insurance company with which the medical organization lacked any contractual relationship. *Id.* at 592-593. That contract case says nothing about the standing of political parties—whose "raison d'être" is advancing the interests of their voters and candidates in elections, *New Hampshire Democratic Party*, 2018 WL 5929044, at *2—to challenge a statute that threatens their members' fundamental electoral rights.

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Defendants are wrong that the infringement of plaintiffs' members' due-process and voting rights "must be disregarded" in the standing analysis (Br.16) because, in defendants' view, those harms lack sufficient "relation to the Plaintiffs' claim that SB 418 violates Part II, Article 32" (Br.21). Defendants cite no authority or logic for this argument, which appears to sound in traceability. No wonder: The "relevant inquiry" for traceability is whether the pertinent injury "can be traced to 'allegedly unlawful conduct' of the defendant, not to the provision of law that is challenged." *Collins v. Yellen*, 594 U.S. 220, 243 (2021). That test is manifestly satisfied here, as the harm facing plaintiffs' members would result directly from defendants' conduct in enforcing the challenged provisions of S.B. 418.

CONCLUSION

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

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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 15th day of August, 2024.

/s/ William E. Christie
WILLIAM E. CHRISTIE

CERTIFICATE AS TO COMPLIANCE WITH WORD LIMIT

I certify that the foregoing document complies with the word limit, set by the Court's order of August 1, 2024, because it contains 3,478 words that count against the limit.

/s/ William E. Christie
Dated: August 15, 2024 WILLIAM E. CHRISTIE

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