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' BRIEF IN RESPONSE TO QUESTIONS POSED IN SEPTEMBER 27, 2024 ORDER

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INTRODUCTION

The recent enactment of House Bill ("H.B.") 1569 underscores the constitutional infirmity of Senate Bill ("S.B.") 418 (the law challenged here) and makes enjoining the latter prior to the November 5 elections all the more imperative. Allowing the S.B. 418 regime to instead remain in place through those elections would risk electoral confusion and disruption.

As explained in appellants' opening brief (at 15-17), S.B. 418 introduced a novel scheme under which a person registering to vote on election day for the first time in New Hampshire who does not bring adequate photo identification to the polls is given an "affidavit ballot." RSA 659:23-a, I. These ballots are to be counted on election day. RSA 659:23-a, IV. But on the seventh day after the election, if an affidavit-ballot voter has not provided sufficient proof of identity to the secretary of state, the secretary is to instruct the moderator of the polling place to retrieve that voter's affidavit ballot and deduct its votes from the final vote tally for each race or issue. RSA 659:23-a, V. As this Court's September 27, 2024 order notes, however, H.B. 1569 repeals this scheme.

The uniquely disruptive timing of H.B. 1569's effective date, and thus the timing of S.B. 418's repeal, heightens the need for an injunction of S.B. 418's affidavit-ballot regime. H.B. 1569 takes effect on November 11. H.B. 1569, §11. But S.B. 418's affidavit-ballot regime culminates in a three-step process that cannot even *begin* until November 12, "the seventh day after the election," RSA 659:23-a, V. In particular:

1. "On the seventh day after the election," the secretary of state must validate the qualifications of affidavit-ballot voters, who under S.B.

418 are given "7 days" from the date of the election to return their qualification packages to the secretary. RSA 659:23-a, V, II(b).

2. After the validation process is complete, the secretary must inform town, city, ward, and precinct moderators of any affidavit-ballot voters who are deemed unqualified and "instruct" the moderators to "retrieve" the ballots of any such voters. *Id.*, V.
3. All votes on the ballots of any unqualified voters must then "be deducted from the vote total" previously certified by the respective town or city clerk (which, pursuant to part II, article 32 of the New Hampshire Constitution, must occur "within 5 days following the election," or November 10). *Id.*

After each of those steps occurs—but "no later than 14 days after the election," which this year is November 19—"[t]he total vote minus the unqualified ballot vote for each race or issue shall be the final vote to be certified by the appropriate certifying authority." RSA 659:23-a, VI.

H.B. 1569 expressly repeals—as of November 11—the statutory basis for *all* the foregoing steps. H.B. 1569, §§10, 11. As of November 12, then, the date authorized by S.B. 418, the secretary will have no authority to disqualify affidavit-ballot voters for failure to complete the validation process; neither the secretary nor local officials will have any authority to "deduct[]" the votes of affidavit-ballot voters from the total certified by the respective clerk under part II, article 32 of the Constitution; and "the final vote" will be as it stood in that certification. Put simply, H.B. 1569 demolishes the S.B. 418 regime.

While the legislature scheduled that demolition for November 11 (again, the effective date of H.B. 1569), it is incumbent on this Court to

prevent any collateral damage from occurring beforehand due to the extraordinary confusion the legislature has introduced into New Hampshire's election system. To take a concrete example, first-time voters without identification on election day will be informed that they must cast affidavit ballots and submit additional paperwork to have their ballots counted when, in fact, the statutory authority to remove those ballots from the count will be repealed six days later.

Appellants' answers to the two questions the Court posed in its September 27, 2024 order are thus as follows:

1. The principle set forth in *Purcell v. Gonzalez*, 549 U.S. 1 (2006) (per curiam), which this Court applied in *Petition of New Hampshire Secretary of State & a.* (No. 2018-0208), militates *in favor* of this Court's issuance of a decision prior to November 6, 2024, enjoining any further enforcement of S.B. 418. Indeed, this Court's October 26, 2018 order in *Petition of New Hampshire* rested on the need to prevent "a substantial risk of confusion and disruption of the orderly conduct of the election, and the prospect that similarly situated voters may be subjected to differing voter registration and voting procedures in the same election cycle." That is precisely the risk that exists here because—under S.B. 418—same-day registrants who lack the requisite documentation (and are not personally recognized by election officials) are required to begin a *seven-day* affidavit-ballot process that H.B. 1569 renders a nullity on *day six*, uniquely burdening that class of voters for no purpose whatsoever. As even the legislature has directed that S.B. 418 regime be abandoned before its worst aspects begin on November 12, there is no reason for this Court to leave it in place through November 10.

2. H.B. 1569's repeal of the statutory provisions at issue in this case does not render the appeal moot until that repeal takes effect on November 11. By revoking the secretary's authority to disqualify affidavit-ballot voters or deduct their votes (none of which can occur, under S.B. 418, until November 12), the repeal addresses the worst aspects of S.B. 418. But the timing of the repeal invites confusion and disruption. Absent an injunction, appellants—and the voters whose interests they represent—will continue to be injured before, during, and immediately after election day because of H.B. 1569's uniquely disruptive effective date. An order from this Court declaring S.B. 418 unconstitutional and directing the superior court to enjoin it would redress that injury.

For all these reasons, and those set forth in appellants' prior briefing, the Court should promptly order that S.B. 418 be enjoined. If instead the Court dismisses the appeal as moot, it should confirm that, in light of H.B. 1569's repeal of RSA 569:23-a in its entirety as of November 11, the specific provisions allowing for the disqualification of affidavit-ballot voters and the deduction of their votes in RSA 659:23-a, V, will have no force and effect as of that date, to avoid any post-election disputes over that point.

ARGUMENT

I. THE *PURCELL* PRINCIPLE FAVORS PROTECTING THE ELECTION FROM CONFUSION AND DISRUPTION

In *Purcell*, the U.S. Supreme Court stated that last-minute changes to election rules may "result in voter confusion and consequent incentive to remain away from the polls." 549 U.S. at 4-5. And "[a]s an election draws closer," the Court added, "that risk will increase." *Id.* Consistent with

Purcell, this Court concluded in *Petition of New Hampshire* that "the timing" of the trial court's injunction there—issued just weeks before the November 2018 elections—created "both a substantial risk of confusion and disruption of the orderly conduct of the election, and the prospect that similarly situated voters may be subjected to differing voter registration and voting procedures in the same election cycle." Order 1, *Petition of New Hampshire*, No. 2018-0208 (N.H. Oct. 26, 2018). This Court also stated in the same case the more general principle that "[i]n awarding or withholding immediate relief" in the election context, "a court is entitled to and should consider the proximity of a forthcoming election and the mechanics and complexities of state election laws, and should act and rely upon general equitable principles." *Id.* at 2 (quoting *Reynolds v. Sims*, 377 U.S. 533, 585 (1964).

Far from suggesting that this Court cannot or should not resolve this appeal in the coming weeks, these cases underscore the imperative that the Court do so. That is because it is *withholding* rather than *providing* relief here that would create the risks of electoral confusion and disruption that *Purcell* and its progeny seek to avoid.

The legislation repealing RSA 659:23-a as of November 11 is a *fait accompli*. What remains between now and November 11, however, is a mess: an administratively cumbersome system that invites delay and confusion on election day (and immediately thereafter) for no purpose whatsoever, as same-day registrants at polling places across the Granite State will be asked to fill out paperwork and send the equivalent of dead letters to the secretary of state in the days following the election. There is no sound reason to leave any aspect of that regime in place. Doing so

would likely result in an enormously chaotic transition period at exactly the worst time, creating a serious risk of voters "remain[ing] away from the polls," *Purcell*, 547 U.S. at 4.

A recent decision from the Arizona Supreme Court illustrates the proper role of courts in protecting the franchise from confusion and disruption on the eve of an election. Two weeks ago, the chief justice of that court excused—on *Purcell* grounds—an "administrative failure" resulting in the registration of nearly 100,000 voters despite state officials' failure to confirm that they had provided the necessary documentation of U.S. citizenship required under state law. *Richer v. Fontes*, 2024 Ariz. LEXIS 263, at *7 (Ariz. Sept. 20, 2024) (Timmer, C.J.). State officials' failure did not become apparent until September, at which point the court was "unwilling" to risk disenfranchising voters because of the government's own mistakes, when "there is so little time remaining before the beginning of the election." *Id.* at *7-8. "Doing so," the court reasoned, "would violate principles of due process." *Id.* at *8.

The same is true here. Less than a month after the parties completed merits briefing to this Court on appellants' constitutional challenge to the affidavit-ballot provisions of S.B. 418, the political branches of the New Hampshire government acted to repeal those provisions as of November 11. That was their prerogative. But what they left in place between now and November 10 is a perfect storm for confusion and disruption. As in Arizona, voters in New Hampshire should not have their fundamental right to vote in well-administered elections jeopardized by the actions of state officials.

Nor are there any equitable reasons for preserving the remaining elements of S.B. 418's voting scheme. Indeed, appellees have never in this litigation opposed an injunction on equitable grounds. Even in their brief in this Court, they attacked only appellants' standing and the legal merits of the constitutional challenge. Intervenors, meanwhile, cannot be heard to complain about H.B. 1569's demolition of the S.B. 418 regime on November 11, having reminded the Court (Br.32) that there is "no right to unchanging state laws."

Finally, this is not a case where plaintiffs unduly delayed in bringing suit, as in *Colón-Marrero v. Conty-Pérez*, 703 F.3d 134 (1st Cir. 2012), where the First Circuit declined to grant relief because plaintiffs waited until two months before a major election to challenge a legal regime that had been in place for years, *see id.* at 139. Governor Sununu signed S.B. 418 into law on June 17, 2022; litigation challenging the legislation was filed that very day, but that case was dismissed on standing grounds without reaching the merits, *603 Forward v. Scanlan*, 2023 WL 7326368, at *5 (N.H. Super. Ct. Nov. 1, 2023). Appellants filed this case promptly after that dismissal to present pure questions of law that could be resolved without discovery in order to obtain a ruling well in advance of the November elections. Appellants even moved for expedited briefing in this Court to avoid any *Purcell* issues—a request intervenors opposed. *Objection to Plaintiffs/Appellants' Motion for Expedited Appeal*, No. 2024-247 (filed May 3, 2024). Intervenors then further slowed the appeal down by obtaining (over appellants' objection) an extension of time to file their brief. *See* July 3, 2024 Order. Any delay in resolving these important issues therefore cannot be attributed to appellants.

* * *

The challenged provisions of S.B. 418 are unconstitutional and should be enjoined for the reasons given in appellants' merits briefs. The confusion and disruption caused by the intervening enactment of H.B. 1569 provides yet another reason. As noted, this Court in 2018 unanimously recognized that "[i]n awarding … immediate relief" in the election context, a court "is entitled to and should consider the proximity of a forthcoming election and the mechanics and complexities of state election laws, and should act and rely upon general equitable principles." Order 2, *Petition of New Hampshire*, *supra*. Those considerations, which reflect the principle animating the U.S. Supreme Court's *Purcell* cases, warrant immediate injunctive relief here.

II. THIS APPEAL IS NOT MOOT BECAUSE THE CONTINUING OPERATION OF S.B. 418 WILL CAUSE CONFUSION AND DISRUPTION PRIOR TO ITS REPEAL ON NOVEMBER 11

This appeal is not moot for the simple reason that the statute at issue in this litigation, RSA 659:23-a, is currently in force—and will remain in force when voters show up to the polls on November 5. Until the repeal takes effect on November 11, there remains a justiciable controversy. Indeed, the Secretary's "Affidavit Ballot Verification Letter" will expressly instruct affidavit-ballot voters on November 5: "If you do not return this letter and a qualified photo identification or other proof identity to the Secretary of State within 7 days following the election, *your affidavit will be used to deduct your votes from the totals determined on election day or at a recount for candidates and questions at this election.*" Appellees' App.6 (emphasis added). That is inaccurate and injurious.

Even if the case were to become moot on November 11, "[t]he question of mootness is one of convenience and discretion and is not subject to hard-and-fast rules." *Williams v. Dover*, 130 N.H. 527, 529 (1988). Thus, this Court "has exercised [its] discretion to review issues that have become moot when they involve significant constitutional questions or matters of pressing public interest," *State v. Spirko*, 2024 WL 3427265 (N.H. June 13, 2024), or where "addressing the issue may preclude future litigation." *Williams*, 130 N.H. at 530.

Those considerations overwhelmingly favor this Court's prompt resolution of the issues in this case. The upcoming elections are surely a matter of "pressing public interest," and enjoining the operation of S.B. 418's affidavit-ballot mechanism prior to November 5 would preclude any litigation by losing parties in close elections—of which there may be hundreds in New Hampshire—that seek to disqualify affidavit-ballot voters or deduct their votes after the statutory basis for doing so is repealed on November 11.

A ruling from this Court declaring the challenged affidavit-ballot provisions of S.B. 418 unconstitutional and directing the superior court to enjoin enforcement of RSA 659:23-a in the upcoming election would also eliminate the risk of confusion and disruption that would exist if those provisions remain in place between now and November 11. For example, it is not difficult to imagine the confusion and delay at the polls caused by asking voters to complete affidavits, compile the necessary documentation, and return them to the secretary of state after the election—while also advising them that the very law requiring them to do so expires before the secretary can take any adverse action on their ballots. The scale of

election-day confusion and disruption could be enormous, as more than 75,000 voters registered on election day in 2020 (Appellants' App.16, Compl. ¶38), and there is every reason to expect this year to be comparable. Similarly, it is not difficult to imagine that, after election day, losing candidates in close elections across the state will (as just mentioned) seek to disqualify affidavit-ballot voters on November 12 or to deduct the votes of such voters, notwithstanding the legislature's repeal of the statutory basis for doing so as of November 11. On that score too, the potential for close elections for state and local office in New Hampshire is very real; as noted in S.B. 418 itself: "Over the past 45 years, New Hampshire has had 44 state elections that ended in a tie or one-vote victory. On average, that is almost once per year." S.B. 418 §1, I.

The ruling appellants seek here would avoid all this by restoring New Hampshire law to what it was prior to S.B. 418's enactment, because "[w]hen a law is challenged as unconstitutional, the claim is that the law is void and hence that no law has been enacted." *Claremont School District v. Governor*, 144 N.H. 590, 593 (1999). That is what has occurred when this Court struck down prior election legislation as unconstitutional. For example, in *Guare v. State*, 167 N.H. 658 (2015), the court required the state to delete language from the voter-registration form added by 2012 legislation, on the ground that the language was "confusing and inaccurate" and thus imposed an undue burden on the right to vote, *id.* at 665. Likewise, in *New Hampshire Democratic Party v. Secretary of State*, 174 N.H. 312 (2021), this Court barred enforcement of S.B. 3, which would have required persons to provide proof of domicile when registering to

vote, because of the undue burdens imposed by that regime, *see id.* at 323. As most relevant here, this Court determined that "SB 3 must be stricken in its entirety." *Id.* 315. The relief appellants seek—a declaration of the affidavit-ballot regime's unconstitutionality and an injunction against its enforcement—is consistent with this Court's dispositions in *Guare* and *New Hampshire Democratic Party* and is warranted for the reasons given above.

III. IF THE COURT DISMISSES THE APPEAL AS MOOT, IT SHOULD CONFIRM THAT RSA 659:23-a WILL HAVE NO FORCE AND EFFECT FOLLOWING THE LAW'S NOVEMBER 11 REPEAL

If, despite the foregoing, the Court dismisses the appeal as moot, it should do so expressly on the ground that the specific provisions allowing for the disqualification of affidavit-ballot voters and the deduction of their votes—codified in RSA 659:23-a, V—will have no force and effect as of November 11, so as to avoid any post-election disputes over any attempt by the secretary or local officials to disqualify affidavit-ballot voters or deduct any of their votes on or after November 12.

CONCLUSION

This Court should reverse the dismissal of appellants' article 32 claim and remand with instructions to enjoin enforcement of RSA 659:23-a prior to November 5.

October 3, 2024

Respectfully submitted,

/s/ William E. Christie

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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 3rd day of October, 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 September 27, 2024, because it contains 3,027 words that count against the limit.

/s/ William E. Christie
WILLIAM E. CHRISTIE