THE STATE OF NEW HAMPSHIRE
SUPREME COURT

Docket No. 2024-0247

Democratic National Committee & a.

v.

New Hampshire Secretary of State & a.

BRIEF FOR THE NEW HAMPSHIRE SECRETARY OF STATE

THE NEW HAMPSHIRE SECRETARY OF STATE

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(Fifteen-minute oral argument requested)

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STATEMENT OF THE CASE AND FACTS[1]

A. Introduction

The Plaintiffs, the Democratic National Committee ("DNC") and the New Hampshire Democratic Party ("NHDP"), seek a declaratory judgment against the Defendants, Secretary of State David Scanlan and Attorney General John Formella, ruling that Laws 2022, Chapter 239 (effective January 1, 2023) ("SB 418"), violates Part II, Article 32 of the State Constitution. SB 418 requires a voter who registers to vote for the first time in New Hampshire on election day and without proof of identity to vote by affidavit ballot, and the law provides an affidavit ballot voter seven days after an election to prove their identity. If that does not occur, the Secretary of State must deduct that voter's votes from the initial election results. *See* RSA 659:23-a. The Defendants moved to dismiss for lack of standing and failure to state a claim.

The Superior Court (*Ignatius*, J.) ruled that the Plaintiffs had standing, but dismissed the Plaintiffs' Part II, Article 32 claim for failure to state a claim. The Plaintiffs appealed the dismissal. The Defendants cross-appealed the trial court's standing ruling.

B. The SB 418 Affidavit Ballot Process

SB 418 creates a procedure for the use of affidavit ballots in certain, limited circumstances. *See* RSA 659:23-a. Specifically, a person is required to use an affidavit ballot when voting only when all of the following conditions are met: (1) the person is registering to vote on

[1] The Plaintiff's Brief will be cited as "PB#"; the Plaintiff's Appendix will be cited as "PA#"; the Defendants' Appendix will be cited as "DA#."

election day; (2) the person has never previously registered to vote in New Hampshire; (3) the person does not have valid photo identification establishing their identity; and (4) the person does not otherwise meet the identity requirements of RSA 659:13, which may be met if the moderator, the clerk, or a supervisor of the checklist can verify the person's identity. *See* RSA 659:23-a, I; RSA 659:13, II(7)(b); *see also* DA8-17 (Secretary of State's February 10, 2023, letter to New Hampshire election officials regarding the affidavit ballot process).

If all these conditions are met, SB 418 provides the person an opportunity to cast an affidavit ballot under RSA 659:23-a. *See* RSA 659:23-a, I; DA8-17. The person 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; DA10-11.

The person then receives and may cast an election-day ballot that is marked "Affidavit Ballot" with a sequential identifying number. RSA 659:23-a, III; DA12-13. The person's affidavit ballot is counted on election day along with all other validly cast ballots. *See* RSA 659:23-a; DA12-13.

If the person 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; DA14-15. Local election

officials report the votes cast on that ballot to the Secretary of State, and those votes are subsequently deducted from the original vote counts for that election. RSA 659:23-a, VI; DA14-15.

C. Procedural History

On December 22, 2023, the Plaintiffs filed the underlying complaint, seeking a declaration under RSA 491:22 that SB 418 violates Part II, Article 32 and Part I, Article 15 of the State Constitution. PA8 (asserting jurisdiction under the declaratory judgment statute); PA22-26. The Plaintiffs additionally requested a preliminary injunction. PA152-177.

The Plaintiffs claimed 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. PA22-23. The Plaintiffs additionally claimed that SB 418 violated the procedural due process rights of affidavit ballot voters. PA23-26; *see also* N.H. CONST., pt. I, art. 15.

At the time the Plaintiffs filed their complaint, SB 418 had been in effect for 2023 town elections, 2023 city elections and primaries, and five special elections and special election primaries to elect members of the New Hampshire House of Representatives. DA26 & n.1. Nevertheless, the Plaintiffs complaint did not identify a single person who had been required to vote by affidavit ballot, let alone a member of their party who had to cast an affidavit ballot or an affidavit ballot voter who failed to timely provide proof of identity after casting an affidavit ballot. *See generally* PA3-29; DA2. Rather, the Plaintiffs complaint relied on unsupported speculation that SB 418 might affect its members, *see* PA6-7, even though no current or former registered member of the New Hampshire Democratic Party could

ever be subject to SB 418's affidavit ballot procedure. *See* RSA 659:23-a, I (providing that the affidavit ballot procedure applies only to voters who, among other requirements, have never before been registered to vote in New Hampshire).

Nor did the Plaintiffs allege any facts that could demonstrate existing harm to either of their organizations. The Plaintiffs merely alleged that, as a result of SB 418 (which had been in place for a year), their organizations "will have to" take certain actions, such as conducting a "broad-based education program targeting thousands of New Hampshire Democratic voters as well as Democratic candidates." PA7-8. The Plaintiffs did not allege that they had spent even a single dollar educating voters regarding SB 418. PA7-8.

The Defendants objected to the Plaintiffs' motion for preliminary injunction and moved to dismiss the Plaintiffs' complaint for lack of standing and failure to state a claim. DA18-34. The Defendants argued that the Plaintiffs, political parties that do not have the right to vote, lacked standing under RSA 491:22 because they had not alleged that SB 418 adversely affected their personal legal or equitable rights. The Defendants argued that the Plaintiffs' Part II, Article 32 claim failed as a matter of law because SB 418 does not impede moderators from fulfilling their constitutional duties under Part II, Article 32.

On February 22, 2024, the Plaintiffs filed affidavits from the Deputy Executive Director of the DNC and the Chair of the NHDP. PA208, 216. In those affidavits, the Plaintiffs referenced a New Hampshire Public Radio article reporting that a single person (of unidentified party affiliation) had cast an affidavit ballot in the 2023 Manchester city election (which is non-

partisan) and had not returned the affidavit ballot verification letter. PA211, 221. Even though 450,000 ballots were cast in the January 23, 2024 Presidential Primary Election, including 125,000 cast ballots in the Democratic Primary Election, the Plaintiffs did not identify a single voter who had voted in that election using an affidavit ballot, let alone a member of their party who had to cast an affidavit ballot or an affidavit ballot voter who failed to timely provide proof of identity after casting an affidavit ballot. PA242.

Regarding the Plaintiffs' Part II, Article 32 claim, the Plaintiffs did not identify any facts demonstrating that their parties would be harmed by vote totals potentially being adjusted seven days after an election due to an affidavit ballot voter failing to provide proof of identification after voting.

On April 16, 2024, the trial court partially granted the Defendants' motion to dismiss and denied the Plaintiffs' request for a preliminary injunction. PB44. The trial court ruled that the Plaintiffs had "organizational standing sufficient to petition for declaratory judgment under RSA 491:22" based on their "alleged diversion of resources, along with their representative capacity on behalf of voters and candidates with constitutional rights to vote and to be elected." PB53. The trial court dismissed the Plaintiffs' Part II, Article 32 claim for failure to state a claim. PB54-57. The trial court denied the Defendants' motion to dismiss the Plaintiffs' due process claim, ruling that, accepting the Plaintiffs' allegations as true, the Plaintiffs had sufficiently pled a procedural due process claim. PB57-62. The trial court further denied the Plaintiffs' request for a preliminary injunction. PB62-63.

On April 22, 2024, the Plaintiffs moved to voluntarily nonsuit their procedural due process claim. DA91-93. The trial court granted the Plaintiffs' motion on April 24. DA91.

The Plaintiffs thereafter appealed the trial court's dismissal of their Part II, Article 32 claim and the trial court's denial of preliminary injunction.

The Defendants cross-appealed the trial court's ruling that the Plaintiffs had standing to pursue a declaratory judgment under RSA 491:22.

SUMMARY OF THE ARGUMENT

A. The Plaintiffs lack standing under RSA 491:22

The Plaintiffs argue that SB 418 violates Part II, Article 32 and seek a declaratory judgment to invalidate SB 418. However, the Plaintiffs lack standing because: (i) SB 418 does not impair a present legal or equitable right of the Plaintiffs; (ii) the Plaintiffs cannot maintain an action under RSA 491:22 to vindicate the rights of third parties; and (3) the Plaintiffs cannot maintain an action under RSA 491:22 based on the federal "diversion of resources" theory of Article III standing that the trial court applied.

i. The Plaintiffs do not individually have standing

The Plaintiffs lack individual standing because they have not identified any "present legal or equitable right or title" of theirs that would be impaired or prejudiced by SB 418. Neither Plaintiff is a "person" who is eligible to vote in New Hampshire, and therefore neither Plaintiff could ever be subject to SB 418's affidavit ballot procedure. Similarly, even if the Plaintiffs' reading of Part II, Article 32 were correct, the Plaintiffs have not articulated, let alone alleged supporting facts showing, how they as organizations could be harmed by an election vote total being adjusted seven days after an election rather than five days after an election. Nor do the Plaintiffs have a legal or equitable right in New Hampshire's election laws remaining immutable. At best, the Plaintiffs have alleged an "abstract interest in ensuring that the State Constitution is observed," which is not "sufficient to constitute a personal, concrete interest." *State v. Actavis Pharma, Inc.*, 170 N.H. 211, 215 (2017).

Therefore, the Plaintiffs lack standing because they have not demonstrated a "definite and concrete," non-hypothetical injury involving the "legal relations of the parties." *Asmussen v. Comm'r, N.H. Dep't of Safety*, 145 N.H. 578, 587 (2000) (emphasis added).

ii. The Plaintiffs do not have standing as organizations

The Plaintiffs lack standing based on alleged harms to the rights of the Plaintiffs' organizational members. To have standing to bring a declaratory judgment action to challenge the validity of a law under RSA 491:22, this Court has made it clear that a plaintiff must show that "some right of [the plaintiff] is impaired or prejudiced" by the law. *See Carrigan v. N.H. Dep't of Health and Human Servs.*, 174 N.H. 362, 366 (2021). The Plaintiffs cannot demonstrate standing based on alleged harm to the legal or equitable rights held by other persons, including the Plaintiffs' organization members. *See Benson v. N.H. Ins. Guar. Ass'n*, 151 N.H. 590, 593 (2004).[2]

iii. The Plaintiffs do not have standing under RSA 491:22 based on the federal diversion of resources theory of standing

Federal cases construing Article III of the Federal Constitution are not informative as to whether a plaintiff has standing in state court to seek a declaratory judgment under a state statute with its own particular requirements. This Court's role is to construe RSA 491:22, not to read into a state statute theories that create Article III standing under the Federal

[2] Notably, the Plaintiffs never identified a single registered member of their political parties who has been required to vote by affidavit ballot pursuant to SB 418, despite that law having been in effect for 2023 town elections, 2023 city elections and primaries, five special elections and primaries, and the New Hampshire Democratic Presidential Primary Election (in which 125,000 registered democratic voters cast ballots).

Constitution. The Plain language of RSA 491:22, as construed by this Court, forecloses standing based on a "diversion of resources" theory because an entity has no legal or equitable right to the law remaining unchanged to avoid a diversion of resources.

Nonetheless, even if the "diversion of resources" theory of Article III standing did apply, the Plaintiffs have not established standing under that theory. Following the Supreme Court's decision in *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982), various federal courts ruled that an organization's decision to spend resources in response to a law that is related to the organization's core goals could constitute a cognizable injury sufficient to establish standing to challenge that law. PB37-38. However, the United States Supreme Court recently disavowed this "diversion of resources" theory of standing. *See FDA v. Alliance for Hippocratic Med.*, 602 U.S. 367, 394 (2024) (reasoning that an organization's "interest" or "opposition" to government conduct does not confer standing, and an organization cannot "spend its way into standing simply by expending money to gather information and advocate against the defendant's action").

Regardless, New Hampshire has never recognized this theory of standing, which runs contrary to the plain language of RSA 491:22 and this Court's cases interpreting a party's standing to challenge the validity of a law under RSA 491:22. *See Avery v. N.H. Dep't of Educ.*, 162 N.H. 604, 608 (2011) (ruling that "a party does not obtain standing under RSA 491:22 merely by demonstrating that he has suffered an injury"; rather, to "question the validity of a law, or any part of it," a plaintiff must "show[] that some right of his is impaired or prejudiced thereby.").

B. The Plaintiffs' Part II, Article 32 claim fails as a matter of law:

The Plaintiffs suggest that Part II, Article 32 somehow prohibits the legislature from enacting laws requiring the Secretary of State to adjust vote totals more than five days after an election. There is no textual support in the Constitution for this argument.

Part II, Article 32 requires a moderator overseeing an election to receive, sort, and count the votes cast in that election, and to declare the election results in the presence of the selectmen and clerk. Thereafter, Part II, Article 32 requires the clerk to make a record of the election results and send a copy to the Secretary of State within five days of the election. SB 418 does not in any way impede election officials from fulfilling their election-day responsibilities or impede a clerk's responsibility to send a record of the election results to the Secretary of State within five days of the election. Nor is there any language in Part II, Article 32 that prohibits the legislature from enacting laws requiring the Secretary of State to adjust vote totals after an election, which the Secretary of State regularly does when conducting recounts of State Elections.

Because the plain language of Part II, Article 32 provides no support for the Plaintiffs' interpretation, the Plaintiffs' argument that SB 418 violates Part II, Article 32 fails as a matter of law.

ARGUMENT

I. STANDARD OF REVIEW

In reviewing a motion to dismiss, this Court's standard of review "is whether the allegations in the plaintiff's pleadings are reasonably susceptible of a construction that would permit recovery." *Sanguedolce v. Wolfe*, 164 N.H. 644, 645 (2013). The Court assumes the plaintiff's pleadings to be true and construes all reasonable inferences in the light most favorable to him. *Id*. However, the Court need not assume the truth of statements in the plaintiff's pleadings that are merely conclusions of law. *Id*. The Court then engages in a threshold inquiry that tests the facts in the writ against the applicable law, and if the allegations do not constitute a basis for legal relief, the Court must affirm the trial court's grant of a motion to dismiss. *See id*.

When a motion to dismiss does not contest the sufficiency of a plaintiff's claims, but instead 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*, 174 N.H. at 366.

II. THE PLAINTIFFS' ONLY CLAIM IS THAT SB 418 VIOLATES PART II, ARTICLE 32, AND THE PLAINTIFFS' ARGUMENTS AND ALLEGATIONS RELATED TO OTHER CLAIMS MUST BE DISREGARDED

The only claim in the Plaintiffs' complaint is the Plaintiffs' request for an RSA 491:22 declaratory judgment ruling that SB 418 violates Part II, Article 32.

Despite this, the Plaintiffs' brief is filled with argument that SB 418 will harm voters by "burden[ing]" their right to vote, *see* PB11, 15, "den[ying] their fundamental right to vote," *see* PB13, 16, or "disenfranchis[ing]" those voters, *see* PB17, 23, 33. These arguments are not relevant to the issue of whether SB 418 violates Part II, Article 32, and the Plaintiffs' allegations of unrelated harm to the right to vote cannot establish the Plaintiffs' standing to bring their Part II, Article 32 claim.

The Plaintiffs never brought a claim alleging that SB 418 may constitute an unreasonable burden on those voters' right to vote under Part I, Article 11 of the State Constitution. See PA3-29. Although the Plaintiffs initially brought a claim alleging that SB 418 would violate the procedural due process rights of some hypothetical voters, the Plaintiffs voluntarily nonsuited this claim. PA25-28; DA91-93. Therefore, the Plaintiffs' claims and arguments related to due process and burdens on the right to vote are not relevant to the issues before this Court and must be disregarded.

Instead, the proper inquiry for this Court is whether the Plaintiffs sufficiently alleged facts before the trial court to demonstrate they had standing to seek a declaratory judgment that SB 418 violates Part II, Article 32 and, if so, whether the Plaintiffs failed to state a claim for which relief may be granted.

III. THE PLAINTIFFS LACK STANDING UNDER RSA 491:22 TO SEEK A DECLARATORY JUDGMENT RULING THAT SB 418 VIOLATES PART II, ARTICLE 32

The Plaintiffs lack standing to seek a declaratory judgment under RSA 491:22 because: (i) SB 418 does not impair a present legal or equitable right of the Plaintiffs; (ii) the Plaintiffs cannot maintain an action

under RSA 491:22 to vindicate the rights of third parties; and (3) RSA 491:22 does not support a "diversion of resources" theory of standing.

A. RSA 491:22 authorizes a plaintiff to seek a declaratory judgment regarding the validity of a law only if that law impairs or prejudices a right held by the plaintiff

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,* 174 N.H. at 366 (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)).

"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." *Avery*, 162 N.H. at 608. (quotation omitted) (emphasis in original). The claims raised in a declaratory judgment action "must be definite and concrete touching the legal relations of 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); *see also Actavis Pharma, Inc.*, 170 N.H. at 215 ("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)). "[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." *Asmussen*, 145 N.H. at 587 (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*, 151 N.H. at 593 (explaining a 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 its own legal or equitable right).

The Plaintiffs cannot maintain a declaratory judgment action challenging the constitutionality of SB 418 unless SB 418 impairs some substantive right belonging to them.

B. <u>The Plaintiffs lack standing because they have not alleged that SB 418 impairs or prejudices any substantive right of theirs</u>

The Plaintiffs seek a declaratory judgment that SB 418 violates Part II, Article 32. PA24-25. The Plaintiffs interpret Part II, Article 32 as prohibiting election results from being adjusted more than five days after an election. PA24-25. The Plaintiffs therefore argue that SB 418 violates Part II, Article 32 because SB 418 requires the Secretary of State to deduct an

affidavit ballot voter's votes if that voter does not provide proof of identification within seven days of the election. Even if the Plaintiffs' interpretation of Part II, Article 32 were correct, the Plaintiffs lack standing to challenge the validity of SB 418 because they have not identified any "present legal or equitable right or title" of the Plaintiffs that would be impaired or prejudiced by SB 418.

The Plaintiffs do not explain how deducting an affidavit voter's votes seven days after an election would impair a legal or equitable right of their organizations. *Cf*. RSA 660:4 (authorizing recounts of election results to begin up to eight days after an election); N.H. CONST., pt. II, art. 33 (Secretary of State does not need to notify elected senators and representatives until 14 days before the first Wednesday in December).[3] Nor did the Plaintiffs allege or produce any evidence demonstrating how the Plaintiffs might be harmed if an affidavit ballot voter's votes were deducted seven days after an election. At best, the Plaintiffs have articulated only an "an abstract interest in ensuring that the State Constitution is observed," which is not "sufficient to constitute a personal, concrete interest." *Actavis Pharma, Inc.*, 170 N.H. at 215 (quotations omitted).

In sum, the Plaintiffs did not allege in their complaint or produce any evidence before the trial court demonstrating a "concrete, personal injury" implicating the Plaintiffs' legal or equitable rights, despite SB 418 having been in effect for numerous elections and for more than a year.

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[3] The first Wednesday in December is always 29 days after the State General Election. *See* RSA 653:7 (requiring the State General Election to be held on the first Tuesday following the first Monday in November).

Accordingly, the Plaintiffs lack individual standing under RSA 491:22 to challenge the constitutionality SB 418. *See* RSA 491:22 (authorizing a person claiming a "present legal or equitable right or title" to "maintain a petition claiming adversely to such right or title to determine the question as between the parties"); *see also Carrigan*, 174 N.H. at 367; *Avery*, 162 N.H. at 608 ("A party will not be heard to question the validity of a law, or of any part of it, unless he shows that some right of his is impaired or prejudiced thereby" (quoting *Baer v. N.H. Dep't of Educ.*, 160 N.H. 727, 730 (2010)).

C. The Plaintiffs do not have standing under RSA 491:22 to challenge the validity of SB 418 based on alleged harm to the Plaintiffs' members.

To have standing to bring a declaratory judgment action to challenge the validity of a law under RSA 491:22, a plaintiff must show that "some right of [the plaintiff] is impaired or prejudiced" by the law. *See Carrigan*, 174 N.H. at 366. As explained above, the Plaintiffs have not identified any right of the plaintiffs that SB 418 impairs or prejudices. Rather, the Plaintiffs seek to establish standing based on speculative injuries to the rights of members of the Plaintiffs' organizations.

Specifically, the Plaintiffs' trial court pleadings and supporting affidavits are replete with speculation as to the potential burdens SB 418 could have on the rights of the Plaintiffs' organizational members to vote, and with argument that SB 418 does not contain sufficient procedures to protect these voters from the risk of erroneous deprivation of their right to vote. Similarly, the Plaintiffs' brief repeatedly alleges that SB 418 will harm voters by "burden[ing]" their right to vote, *see* PB11, 15, "den[ying]

their fundamental right to vote," *see* PB13, 16, or "disenfranchis[ing]" those voters, *see* PB17, 23, 33.

Under this Court's precedent, the Plaintiffs cannot demonstrate standing to bring an RSA 491:22 declaratory judgment action based on alleged harm to the legal or equitable rights of other persons, including the Plaintiffs' organization members. *See Benson*, 151 N.H. at 593 (ruling that medical society's "status as the representative membership organization for medical practitioners statewide" did not give the organization a "clear and direct interest in the litigation" regarding a law that would impact the organization's members).

Moreover, these alleged harms have no relation to the Plaintiffs' claim that SB 418 violates Part II, Article 32. Rather, these alleged harms all relate to potential burdens on the right to vote or the lack of sufficient procedural process to protect the right to vote; *i.e.*, violations of Part I, Article 11 and Part I, Article 15. Because the Plaintiffs complaint does not allege a violation of Part I, Article 11, and because the Plaintiffs voluntarily nonsuited their claim that SB 418 violates Part I, Article 15, harms to third parties related to alleged violations of these provisions cannot confer standing on the Plaintiffs to seek declaratory judgment ruling that SB 418 violates a different constitutional provision—Part II, Article 32.

D. <u>The Plaintiffs' alleged "diversion of resources" cannot support standing under RSA 491:22 to challenge the validity of SB 418</u>.

The Plaintiffs argued before the trial court that they have standing because "S.B. 418 requires them to divert their time and resources toward educating voters about how to comply with the law and ensure the ballots they cast are actually counted." DA53 (quotation and brackets omitted);

PB53. This "diversion of resources" theory of standing is derived from federal cases interpreting Article III standing under the Federal Constitution and the United States Supreme Court's opinion in *Havens Realty Corp.*, 455 U.S. 363. *See* DA53-55. The Plaintiffs' allegations that they will have to divert resources are not sufficient to confer standing under RSA 491:22 to challenge the validity of SB 418.

This Court has never recognized the "diversion of resources" theory of standing, and for good reason. The "diversion of resources" theory of standing runs contrary to the plain language of RSA 491:22 and this Court's cases interpreting a party's standing to challenge the validity of a law under RSA 491:22.

Under this Court's precedent, "a party does not obtain standing under RSA 491:22 merely by demonstrating that he has suffered an injury." *Avery*, 162 N.H. at 608. Rather, RSA 491:22 requires a party to claim "a present legal or equitable right or title" adverse to the defendant. *Id*. (quoting RSA 491:22, I); *see also Carlson, Tr. v. Latvian Lutheran Exile Church of Boston and Vicinity Patrons*, 170 N.H. 299, 304-05 (2017) (trespassory use of land over which the plaintiff had a non-exclusive access easement was not sufficient to establish standing under RSA 491:22 because, absent interference with the plaintiff's right, the plaintiff did not have a legal or equitable right to exclude another's use of the land). Thus, a "party will not be heard to question the validity of a law, or any part of it, unless he shows that some right of his is impaired or prejudiced thereby." *Avery*, 162 N.H. at 608. (quotation omitted); *see also Asmussen*, 145 N.H. at 578; *Benson*, 151 N.H. 590.

Even if the Plaintiffs are "harmed" in the sense that they will choose to expend their organizational resources educating voters about voting procedures and changes in election laws, the Plaintiffs do not have a "legal or equitable right or title" prohibiting the Legislature from making any change to election procedures. In other words, the Plaintiffs cannot spend their way into standing to challenge election laws that do not impair or prejudice a right or title held by the Plaintiffs. If such a theory were the law, any member of the public could come up with a way in which a law, whether new or old, causes them to divert resources. This Court has been clear that such a generalized inconvenience does not create standing under RSA 491:22.

Even if the federal diversion of resources theory of standing applied, the Plaintiffs' reliance on that theory is misplaced. Prior to the Plaintiffs filing their brief, the Supreme Court issued an opinion ruling that the *Havens Realty Corp.* does not stand for the proposition that that a plaintiff can "spend its way into standing simply by expending money to gather information and advocate against the defendant's action." *Alliance for Hippocratic Med.*, 602 U.S. at 370. The Supreme Court further reiterated that "an organization may not establish standing simply based on the intensity of the litigant's interest or because of strong opposition to the government's conduct, no matter how longstanding the interest and no matter how qualified the organization." *Id*. (cleaned up).

IV. SB 418 DOES NOT VIOLATE PART II, ARTICLE 32

A. Standard of Review

The Plaintiffs argue that SB 418 violates Part II, Article 32 and is therefore facially unconstitutional. PB21. To prevail on a facial challenge,

the challenger must establish that no set of circumstances exists under which the challenged statute or ordinance would be valid. *State v. Lilley*, 171 N.H. 766, 772 (2019).

To resolve the Plaintiffs' facial challenge, the Court must interpret Part II, Article 32. When interpreting a provision of the constitution, the Court looks to its purpose and intent. *Carrigan*, 174 N.H. at 369. "The first resort is the natural significance of the words used by the framers." *Duncan*, 166 N.H. at 640 (quotation omitted). "The language used by the people in the great paramount law which controls the legislature as well as the people, is to be always understood and explained in that sense in which it was used at the time when the constitution and the laws were adopted." *Carrigan*, 174 N.H. at 369 (quotation omitted). "The simplest and most obvious interpretation of a constitution, if in itself sensible, is most likely to be that meant by the people in its adoption." *Duncan*, 166 N.H. at 640 (quotation omitted).

B. <u>Part II, Article 32 sets forth election duties for municipal officials and does not prohibit the legislature from enacting laws requiring the Secretary of State to adjust initially-reported vote totals</u>

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.

By its plain language, Part II, Article 32 simply sets forth certain election duties for selectmen, moderators, and clerks. Selectmen must warn State elections. In the presence of selectmen and clerks, moderators must receive, sort, count, and declare the results of votes made in the election. Clerks must make a record of the same and provide a copy to the Secretary of State within five days following an election. The simplest, obvious interpretation of Part II, Article 32 is that it requires election officials to conduct State elections in an open meeting and to timely report the results to the Secretary of State.

SB 418 does not impede the duties of local election officials in any way. A moderator must still declare election results after receiving, sorting, and counting votes. A clerk must still make a record of the same before an election ends and send a copy to the Secretary of State within five days. 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 or clerk previously completed their duties under Part II, Article 32.

Furthermore, nothing in the plain language of Part II, Article 32 prohibits the legislature from enacting a law requiring the Secretary of State to adjust a moderator's initially-declared election results, which the Secretary of State regularly does when conducting recounts of State

elections. *See* RSA 660:4 (requiring the Secretary of State to conduct recounts, which must begin within eight days of an election); RSA 660:6 (requiring the Secretary of State to declare the candidate to be elected following a recount). Indeed, when the Constitution was amended in 1976 to reduce the time for clerks to report a moderator's initial election results to the Secretary of State to five days after an election, New Hampshire law already provided for the Secretary of State to conduct recounts no earlier than ten days after an election. *See* RSA 59:94 (1970) (providing candidates with ten days to request a recount; requiring the Secretary of State to conduct a recount at least ten days after receiving a request).

In other words, the Plaintiffs erroneously interpret Part II, Article 32's requirement that a clerk timely report a moderator's initial 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 SB 418 violates Part II, Article 32 fails as a matter of law.

V. THE PLAINTIFFS ARE NOT ENTITLED TO A PRELIMINARY INJUNCTION

Because the Plaintiffs lack standing and their Part II, Article 32 claim fails a matter of law, they were not entitled to a preliminary injunction below. If the Court rules that the Plaintiffs lack standing or affirms the trial court's dismissal of the Plaintiffs' Part II, Article 32 claim, the Plaintiffs cannot succeed on the merits and are therefore not entitled to a preliminary injunction.

CONCLUSION

SB 418 provides an affidavit ballot voter seven days to prove their identity, or else the Secretary of State must deduct the voter's votes from election results. The fact that SB 418 provides this additional time for a voter to prove their identity does not impair or prejudice any legal or equitable right held by the Plaintiffs, who are not voters. Therefore, the Plaintiffs lack standing to maintain a declaratory judgment action challenging the validity SB 418.

Even if the Plaintiffs had standing, Part II, Article 32 does not prohibit the legislature from enacting laws directing the Secretary of State to adjust the initial election-night vote count of local election officials, such as through recounts or SB 418's affidavit ballot procedure.

Because the Plaintiffs lack standing and their Part II, Article 32 claim fails on the merits, the Plaintiffs were not entitled to the preliminary injunction they sought. The trial court's dismissal of the Plaintiffs' case should therefore be affirmed.

The Defendants request fifteen-minute oral argument.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

I, Brendan A. O'Donnell, hereby certify that pursuant to Rule 16(11) of the New Hampshire Supreme Court Rules, this brief contains approximately 6595 words, which is fewer than the words permitted by this Court's rules. Counsel relied upon the word count of the computer program used to prepare this brief.

Date: July 26, 2024 /s/ *Brendan A. O'Donnell*
Brendan A. O'Donnell

CERTIFICATE OF SERVICE

I hereby certify that a copy of the Defendants' brief was sent through the Court's electronic filing system to all parties of record:

Date: July 26, 2024 /s/ *Brendan A. O'Donnell*
Brendan A. O'Donnell