THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS. SUPERIOR COURT

DEMOCRATIC NATIONAL COMMITTEE and
NEW HAMPSHIRE DEMOCRATIC PARTY,

Plaintiffs

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
and
REPUBLICAN NATIONAL COMMITTEE AND
NEW HAMPSHIRE REPUBLICAN STATE COMMITTEE,
Intervenors

Docket No. 226-2023-CV-00613

INTERVENORS' MOTION TO DISMISS

I. Introduction

Plaintiffs' two-count declaratory judgment complaint attacking reforms enacted by the General Court in SB 418 should be dismissed for failure to state a claim. Contrary to Plaintiffs' assertions, New Hampshire law does not afford the plaintiff political parties, nor their members, nor unidentified New Hampshire citizens any right to "obtain timely election results," *Compl.* at ¶50. And even if it did, SB 418 does not violate any such right. Further, the complaint does not identify any property or liberty interest affected by SB 418 or any

facts to suggest that SB 418 unduly burdens any such right or subjects any such risk to erroneous deprivation. For these reasons, the Court should grant this motion to dismiss.

II. Standard of Review

In ruling on a motion to dismiss, the Court must determine "whether the allegations in the plaintiff's pleadings are reasonably susceptible of a construction that would permit recovery." *Tessier v. Rockefeller*, 162 N.H. 324, 329 (2011) (quoting *Gen. Insulation Co. v. Eckman Constr.*, 159 N.H. 601, 611 (2010)). "The court must vigorously scrutinize the complaint to determine whether, on its face, it asserts a cause of action." *Id.* (quoting *Williams v. O'Brien,* 140 N.H. 595, 597, 669 A.2d 810 (1995)) (emphasis and quotation omitted). The Court must "assume the [plaintiff's] pleadings to be true and construe all reasonable inferences in the light most favorable to [the plaintiff]." *Id.* However, the Court need not, "assume the truth of statements in the [plaintiff's] pleadings… that are merely conclusions of law." *Id.* Because this case involves a constitutional challenge to a legislative act, the Court "must presume the [statute] to be constitutional and…not declare it invalid except upon inescapable grounds." *Am. Fed'n of Teachers–N.H. v. State of N.H.*, 167 N.H. 294, 299 (2015).

III. Facts Alleged In The Complaint

The complaint is largely devoid of "facts" bearing on their claims. Instead, it consists primarily of a compendium of entirely speculative harms and reasons Plaintiffs opposed SB 418 while it was being considered–and ultimately enacted–by the General Court and Governor Sununu. Plaintiffs posit that SB 418 "likely deters some would-be voters," *compl.* at 13, will cause voters "to face longer lines at the polls," *id.,* "creates a significant risk

that Democratic voters who do not have photo IDs…will choose not to vote," *id.* at ¶15, will inflict harm on absent-minded voters "who simply forget [to send documentation] or misplace the verification letter [to] have no recourse," *id.* at ¶56, and "creates a significant risk of disenfranchisement." *Id.* at ¶58. These allegations are entirely conclusory.

And as their members argued–unsuccessfully–during the legislative process, Plaintiffs assert SB 418 is unnecessary because "New Hampshire enjoy[s] high voter turnout," *id.* at ¶24, "voter fraud is…rare in this state," *id.* at ¶37, and our "elections are secure, accurate, and reliable…." *Id.* Lawmakers considered these issues and enacted SB 418 to further their constitutional obligation to protect the integrity of New Hampshire's elections by ensuring that the state can verify the identity of people who register to vote on election day before their votes are counted and affect the outcomes of races both local and federal.

All of these allegations share one thing in common: They are insufficient to make out any claim that SB 418 is unconstitutional, whether under Plaintiffs' "final results" theory or under their claim that it violates their members' rights to procedural due process.

IV. Argument

A. Nothing In the Complaint Pleads A Violation of Any Right Protected by Part II, Art. 32 of the New Hampshire Constitution.

Plaintiffs assert that SB 418 violates their "right to obtain timely election results" within five days of election day *compl.* at ¶50, because "it delays the final vote count until seven–and potentially up to fourteen–days after the election." *Id.* at ¶70. But Article 32, the constitutional provision upon which Plaintiffs' build their case, does not afford any enforceable right to "timely election results," and certainly no privately enforceable right. In

any event, Plaintiffs misconstrue whatever rights the provision might afford them because it does not guarantee final election results within any particular time period–let alone five days–and it does not impose upon the Secretary of State or any other election official a duty to issue a certificate of election or otherwise finalize election results within that time frame.

The plain language of Article 32 describes two separate time periods in which local officials are to perform certain election administration tasks, neither of which preempts enforcement of SB 418. First, on the day of the meeting at which the election is conducted, the "moderator…shall…sort and count the said votes, and make a public declaration thereof…and the town clerk shall make a record of the same…." *N.H. Const.* Pt. 2 Art. 32. Second, the town clerk "shall make out a fair attested copy [of the moderator's declaration], to be by him sealed up and directed to the secretary of state, within five days following the election…." *Id.*

Count I fails to state a claim because Plaintiffs' generalized interest in the electoral process and the administration of election laws in New Hampshire is not protected by the conduct of the ministerial duties established in Article 32. The plain text of the provision does not create an enforceable right—and certainly not one enforceable by private parties. This is evident by the fact that no party has ever sought to enjoin a town clerk to comply with the 5-day deadline, and such a suit would be a true novelty in this state. Further, if any party has "rights" under Article 32—and none are likely to—it would be only the Secretary, the only entity specifically identified in the provision with any arguable right to the relevant information. Accordingly, Plaintiff's allegations that provisions permitting vote tallies to be

adjusted in the weeks after election day violate their alleged right to a final tally within five days must fail as a matter of law.

In any event, whatever right Article 32 arguably confers on Plaintiffs, it cannot be any right to a final, unchangeable tally of votes within 5 days of election day as alleged in the Complaint. Nothing in SB 418 interferes with the operation of Article 32. Notwithstanding SB 418, the moderator will continue to "sort and count" the votes and "make a public" declaration of that count. And the town clerk will still record the moderator's declaration, *see, Opinion of the Justices,* 53 N.H. 640, 642 (1873), and forward that declaration to the Secretary of State—all within 5 days of the election. Nothing in Article 32, or in any judicial precedent, imposes Plaintiffs' "finality" requirement on Article 32's post-election procedures. Indeed, such a requirement is entirely absent from the text of Article 32 and contrary to the laws regulating election administration in this state.

The Complaint simply invents a finality requirement. It asserts that SB 418 will violate Article 32's requirement that "final vote totals be delivered" to the Secretary within five days. *Compl.* at ¶46; *see also id.* at ¶70]. But the word "final" is Plaintiffs' own insertion. It is not in Article 32, even by implication. Nothing in Article 32 suggests that the moderator's declaration is synonymous to or must match the certificate of election that ends the election. *See* RSA 659:84. In the final analysis, Article 32 imposes a duty on the town clerks to act within 5 days, but Article 32 does not mark the end of counting or adjudicating the validity of ballots in the state.

The legislative history likewise cuts heavily against Plaintiffs' attempt to inject a five-day finality construction into Article 32. The words "within five days following the election"

were proposed by Constitutional Convention of 1974, and presented to the People for consideration in the 1976 election. The question submitted to the voters read, "8. Are you in favor of amending the Constitution to make the following changes relating to elections… (d) to specify that the receipt and counting of ballots and notification of winners in biennial election contests will be handled by the secretary of state." 45 New Hampshire Manual 687-688 (1977). Thus, far from imposing a time limit on local election officials to determine the winner of the contest, the People understood that they were enacting a provision that would require town clerks to act in a timely fashion while vesting responsibility for finally resolving the election in the secretary of state. This also only further supports the point above that, to the extent Article 32 confers any "rights," it does so only to the Secretary.

Further, numerous election law provisions establish that the moderators' election night declarations are the starting point, not the finishing point for counting and adjudicating ballots. Were it otherwise, for example, the entire system of recounts would be unconstitutional. *See* RSA 660:1-6. During recounts, the validity of ballots may be adjudicated. *See* RSA 660:5 (detailing candidates' rights to "protest the counting of or failure to count any ballot"). Ballots excluded may be included, and just as with SB 418, ballots previously included may be excluded if they are invalid. Notably, all such recount procedures, from the meeting of the ballot law commission to Supreme Court appeals of the commission's decisions occur well after the five-day period set forth in Article 32. *See, e.g.*, RSA 665:5 ("[t]he ballot law commission shall meet on the fourth Monday in November in each general election year"); RSA 665:16 ("[t]here may be an appeal to the supreme court from the decision of the ballot law commission made under RSA 665:8, II…. Such appeal

shall be filed with the clerk of the supreme court within 5 days after the decision of the commission is filed with the secretary of state"). Indeed, the law anticipates that the town or ward clerk may be required to amend his or her return after five days have passed. RSA 659:79 ("If a town or ward clerk shall make an incorrect or incomplete election return, the moderator may require that clerk…to appear and amend the return according to the facts within 4 hours of receipt of notification from the secretary of state"). Quite obviously, then, the tally of ballots in any election cannot be definitively final and official until well after five days from the election.

Although it has absolutely no bearing on Plaintiffs' Article 32 claim—and thus is wholly irrelevant to either of their two counts—there is also no merit to their suggestion that SB 418 conflicts with any other statutory provision. As an initial matter, when a conflict exists between two statutes, the later enacted statute will control, especially when the later statute deals with a subject in a specific way and the earlier enactment treats that subject in a general fashion. *Bel Air Associates v. N.H. Dept. of Health and Human Services,* 154 N.H. 228, 233 (2006). But there is no conflict here, particularly in light of the traditional rules of statutory construction. Were it relevant to the case—and it is not—the Court would have to make every effort to reconcile conflicting statutory directives. Thus, it would "interpret statutes in the context of the overall statutory scheme and not in isolation," *Appeal of Lake Sunapee Protective Association,* 165 N.H. 119, 125 (2013), and "apply statutes in light of the legislature's intent in enacting them, and in light of the policy sought to be advanced by the entire statutory scheme." *Id.* And where, as here, the statutes are "upon the same subject-matter," they should, "where reasonably possible" be "construed as consistent with each

other," to "not contradict each other" and to "lead to a reasonable result and effectuate the legislative purpose." *Nault v. N&L Development Co.,* 146 N.H. 35, 38 (quoting *State v. Farrow*, 140 N.H. 473, 475 (1995)). In other words, courts must attempt "to construe [statutes] in harmony with the overall statutory scheme." *Clearview Realty Ventures, LLC v. City of Laconia*, 175 N.H. 671. 675 (2023).

On their face, and particularly when construed according to the proper rules of statutory construction, SB 418 is in complete harmony with other statutes with Supreme Court precedent, and with the longstanding practice of post-election dispute resolution. Plaintiffs first assert that SB 418 conflicts with RSA 659:63's requirement that "[t]he counting of votes…shall not be adjourned or postponed until it should have been completed." *Compl.* at ¶52. Not so. SB 418 does not require election officials to adjourn counting any votes. To the contrary, it provides that "[a]ll affidavit ballots shall be cast in person at the polling place, placed in a container designated 'Affidavit Ballots,' and hand counted after polls have closed using a method prescribed by the secretary of state for handing counting and confirmation of candidate vote totals." In other words, the affidavit ballots are counted along with other ballots, just as RSA 659:63 requires. The only wrinkle is that they are segregated from those ballots. Nothing in RSA 659:63, however, forecloses such segregation.

Next, Plaintiffs' effort to manufacture a conflict out of the requirement to transmit "election returns" incorporating the moderator's announcement of "final results" suffers from the same defect as their constitutional claim. Namely, that while election returns may incorporate the moderator's "final results" from the election night tally, New Hampshire law

is clear that those are not necessarily the final results of the election. The outcome of the election remains dependent on actions that can be taken by the secretary of state, the ballot law commission, or the courts. Thus, while the election night count may be the "final count" of the election night tally and the "final count" of the moderator, it is by no means the final word on the election.

This most recent general election cycle involved a matter that reflected the ongoing nature of election contests, even after the requirements of Part II, Art. 32 are met. The 2022 general election was held November 8, 2022. On Election Day, the Return of Votes Form completed by election officials in Manchester Ward 6 reflected 4001 ballots taken and cast," and that the candidates receiving the most votes were William Infintine (R) and Larry Gagne (R). *Exhibit 1* at 2. Plaintiffs Maxine Mosely and Donna Soucy filed an application for a recount pursuant to RSA 660:1, which the secretary of state held on November 14, 2022– seven days after the election. Following the recount, Mosely had gained 2 votes and Gagne's vote tally was reduced by 22. *Id.* The secretary of state declared Mosely the winner. *Id.*

The race for Hillsborough District 16 had been randomly selected for audit pursuant to RSA 660:17-a. *Id.* at 3. Based on a discrepancy revealed by the audit, the secretary of state determined that it was likely that one stack of 25 uncounted ballots was inadvertently included in a stack of counted ballots, resulting in approximately 25 votes remaining uncounted in the recount. *Id.* On November 17, 2022, the secretary of state issued a Notice concerning the election, stating that ballot counting would be continued in that race on November 21, 2022. Mosley and Soucy filed a petition for preliminary injunction in this court, asserting *inter alia* that once the winner had been declared the counting could not

resume and urging the court to enjoin further counting of ballots, even if there was reason to believe that the outcome of the election would result in the person receiving less votes being declared the winner. *Id.* The Court held a hearing on November 21 and issued an Order on November 22–nineteen days after the election–denying the injunction. The recount continued, the discrepancy was resolved, and Gagne was once again found to be the person with the most votes and declared the winner.

Both the historical practice and our own Supreme Court's precedents make clear that the election-day duties of the moderator and clerk are merely steps in the process of holding elections and determining the outcome of those contests. They do not mark a point of finality in which the Plaintiffs have rights protected by the Constitution. Count I should be dismissed.

B. Nothing In The Complaint Pleads Any Violation of Plaintiffs' Procedural Due Process Rights

Count II alleges that the procedures set in place by SB 418 violate Plaintiffs' right to procedural due process protected by Part I, Art. 15 of the New Hampshire Constitution. Notably, Plaintiffs do not challenge any burden that SB 418 may impose upon their right to vote under Part I, Art. 11. Thus, in the first instance, the Court should dismiss Count II of the complaint for failure to state a claim because the procedural due process claim that Plaintiffs have chosen to bring does not lie as a mechanism to challenge the state's election laws. The weight of authority in federal courts is that procedural due process challenges to election rules are assessed under the *Anderson-Burdick* framework. *See, Ariz. Democratic Party v. Hobbs*, 18 F.4th 1179-1194-95 (9th Cir. 2021); *Richardson v. Tex. Sec'y of State*, 978 F.3d 220, 233-35 (5th Cir. 2020); *New Ga. Project v. Raffensperger,* 976 F.3d 1278, 1282 (11th Cir. 2020).

Plaintiffs have not cited any cases supporting their claim that a challenge to New Hampshire election laws can be maintained under Part I, Article 15. Accordingly, this Court should follow the compelling federal circuit precedent, find that Part I, Article 15 is an improper basis upon which to mount an election law challenge, and dismiss Count II.

But even if the Court declines to dismiss Count II because Plaintiffs failed to plead the proper claim, SB 418 still withstands scrutiny. Plaintiffs allege only that, having burdened the right, SB 418 fails to implement sufficient procedures to ensure that the burden is not inflicted on people by error or accident. In determining whether challenged procedures satisfy the due process requirement "[the court must] employ a two-part analysis. First, [it must] determine whether the challenged procedures concern a legally protected interest. Second, [it must] determine whether the procedures afford the requisite safeguards." *Petition of Bagley*, 128 N.H. 275, 281-82 (1986). In deciding whether the challenged procedures afford the requisite safeguards, the court must consider the following factors: "(1) the private interest affected by the official action; (2) the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and (3) the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail." *Id.* (quoting *Appeal of Portsmouth Trust Co.,* 120 N.H. 753, 756 (1980)).

Plaintiffs Complaint fails at step 1. They assert that the private interest at issue is the "right to a 'free' election and the 'equal right to vote.'" *Compl.* at ¶75. (citing N.H. Const. Pt. 1, Art. 11). But this is not a right to vote case. At most, this is a right to same-day

registration case. Plaintiffs, however, have no property or liberty interest in election day registration. *See Marston v. Lewis*, 410 U.S. 679 (1973) (upholding 50-day residency and registration requirement). Nor do they have any such interest in voting without documentation that does not run afoul of substantive constitutional restrictions. *See Crawford v. Marion County Election Board*, 553 U.S. 181 (2008) (upholding photo identification requirement).[1] And no person has a constitutional right to have a ballot counted if they have not proven their qualifications to vote to the satisfaction of state law, so long as that law comports with the substantive demands of constitutional law.

Accordingly, the only right at stake in this case is a pure creature of statute. That is the right the legislature has afforded to people to register to vote at the polls on election day. Whatever *substantive* limits the Constitution may impose on the legislature's authority to regulate that statutory benefit, by for example limiting its availability to certain classes of people, are not traceable to its guarantee of *procedural* due process and therefore not at stake in this case. Within the substantive limits of the state and federal constitutions, the legislature is free to tailor the scope of the benefit as it sees fit, including by repealing it altogether without offending any person's procedural due process rights. As a threshold matter then, procedural due process does not attach to statutory rights of this type. *See Richardson v. Texas Secretary of State*, 978 F.3d 220, 230-33 (5th Cir. 2020) (rejecting the argument that due process attaches to statutory expansions of voting regimes); *Correa-Ruiz v. Fortuno*, 573 F.3d 1, 14–15 (1st Cir. 2009) (holding that "no due process violation occurs

[1] Plaintiffs, of course, have not alleged that the photo identification requirement directly burdens their right to vote, whether that right is protected by the state or federal constitution. They have challenged only the constitutional sufficiency of the procedures New Hampshire uses to enforce that requirement.

when 'the legislature which creates a statutory entitlement, alter[s] or terminat[es] that entitlement by subsequent legislative enactment"); *see also Board of Regents of State Colleges v. Roth*, 408 U.S. 564 (noting that it would "stretch[] the concept" of liberty "too far to suggest that a person is deprived of liberty" when the person "has no right to the object of his alleged liberty interest."). If the right to bring a procedural due process challenge attached to every statutory regulation of the election apparatus adopted by the legislature, the authority of the General Court to exercise Supreme Legislative Power vested it in by Part I, Art. 2 of our Constitution would be usurped by the judicial branch, raising serious separation of powers concerns. *See, N.H. Const.* Part I, Art. 37.

Yet, the Complaint here makes it clear that this is precisely what Plaintiffs ask this Court to do. They repeatedly argue that SB418 was not necessary, *compl.* at ¶¶36-41, that the pre-existing system was just fine, *compl.* at ¶¶21-24, and that it was likely to have negative effects on the voting system. *Compl.* at ¶¶60-64. These arguments are irrelevant to Plaintiffs' procedural due process rights, are inherently legislative in nature, and are best left to legislators, as "[a] state legislature is the institution that is by far the best situated to identify and then reconcile traditional state policies within the constitutionally mandated framework…." *Brown v. Sec'y of State*, 2023 WL 8245078 *5 (N.H. Nov. 29, 2023).

Plaintiffs' base contention is that any alteration of any election regulation implicates procedural due process has far-reaching consequences not contemplated by New Hampshire's Constitution. Plaintiffs' claim is that having offered the people of this state the benefits of same-day registration, the legislature also conferred upon every person in this state a liberty interest in the operation of that regime. That means that any subsequent

regulation of same-day registration that alters its availability even for one person and even ever so slightly must be tested against the demands of procedural due process. But nothing in our Constitution suggests that procedural due process ties the hands of the legislative branch in this way.

Procedural due process does not attach to every benefit conferred by the legislature. Here, the state has allowed same-day registration and voting, but it has limited the extent of that benefit to those who can prove their identity. There is no allegation anywhere in the complaint that this limit violates any substantive restriction on the legislature's authority. This limit is not alleged, for example to unjustly discriminate against any class of voters. Plaintiffs simply do not challenge the legislature's general authority to require same-day registrants to provide photographic identification. As a result, those affected by the limit are no differently situated than if the legislature had repealed same-day registration altogether, which it may undoubtedly do without offending either procedural due process, equal protection, or the substantive right to vote. Accordingly, such persons cannot be heard to complain that others might still have access to the benefit.

Regardless of any of the foregoing, the risk of an erroneous deprivation of any interest, statutory or otherwise, is exceedingly low and *entirely* within the control of the putative voter. First, any first-time New Hampshire citizen who lacks any of the myriad acceptable and eminently accessible forms of photo identification can register to vote on any day other than election day without photo identification. *See* RSA 654:7. And, having registered to vote before election day, such a person can vote early, in person or by mail, or in person on election day without any photo identification. Second, any putative first-time

voter who elects, of his own volition, to register on election day is on notice that photo identification is required. That's the first notice. And one who does not have acceptable photo identification is given *explicit notice* of what he needs to do to ensure his ballot is counted. He is given a detailed letter called an affidavit voter verification letter, "which lists all the documents required to qualify to vote in the state of New Hampshire." RSA 659:23-a. That's the second notice.

As for opportunity to be heard, SB 418 offers plenty of that too. The would-be voter is given a prepaid overnight express delivery envelope already fully addressed to the secretary of state. And he is given a full 7-day week to transmit the documents listed on the letter to the Secretary. For those who cannot afford the minimal cost of photographic proof of identity, the affidavit letter comes with a blank voucher that can be used to secure identification without charge.

And finally, there is almost no risk that any person who follows these steps will be deprived of any right they have, constitutional, statutory, or otherwise. Once the would-be voter fulfills their obligations, there is no government official making any subjective determination. If an acceptable form of identification is submitted, the ballot counts. It's that simple. Evaluation of identification documents is simply not a task that is fraught with error or one that requires any specialized training. *See Saucedo v. Gardner,* 355 F.Supp.3d 202, 217 (D.N.H. 2018). And it is a procedure that election officials across the state engage in hundreds of thousands of times each election day. If there were a latent identification recognition problem, we would know about it. Plaintiffs also completely ignore the fact that there is nothing in SB 418 that interferes with the ability of voters to either check on the

status of the documents they provided or enlist the assistance of election officials–or the Plaintiffs themselves–in proving up their qualifications to have their vote counted. Because voters have the ability to keep track of their documentation efforts and remedy any perceived deficiencies during the seven-day period, SB 418 is materially more robust than absentee voting or other procedures in which a voter's ballot can be rejected.

Against all of this, the Complaint contains not a single factual allegation establishing that HB 418 burdens any person or risks depriving any person of any alleged right. The allegations of burden are encompassed within paragraphs 54 through 64, and paragraph 77 of the Complaint. Each paragraph is conclusory. They describe what HB 418 requires of same-day registrants who arrive at the polls without photographic identification and allege that this will "deter" and "disenfranchise" voters. But they contain no facts from which to infer that either of those events might occur. Nothing is alleged, for example, about the number of same-day registrants who show up without any identification. Nothing is alleged about how many such people lack an acceptable form of identification. Nothing is alleged about why those people might have difficulty understanding what constitutes an acceptable form of identification. Nothing is alleged about why they might have difficulty obtaining an acceptable identification from the state free of charge. And nothing is alleged about why any such people might have difficulty using a pre-paid, pre-addressed envelope to return a copy of that identification to the state.

The Complaint's two closest allegations fall woefully short of the mark. In paragraphs 60 through 64, the Complaint describes some frustrations a candidates had with HB 418's implementation. These frustrations are irrelevant to whether HB 418 burdens or places at

risk any voters' rights. And in paragraph 77, the Complaint speculates that college students may not receive an "identity-verification mailing" at the right campus address. But HB 418 contemplates only a mailing from a same-day registrant (in a pre-paid, pre-addressed envelope), not a mailing to any such person.

In the end, even if there was a deprivation of any substantive right, the source of that deprivation is the would-be the registrant, not the state. If the would-be registrant follows directions and arrives at the polls with appropriate identification, there is no deprivation. If he submits a copy of the missing identification documents within the 7-day cure period, there is no deprivation.

There is no merit to Plaintiffs' assertion that delays in the mail might produce a deprivation or that notice must be provided when an affidavit ballot is not counted. The same assertions could be made with respect to any electoral process that relies on the mail system. But in case after case, courts have rejected arguments that due process, substantive or otherwise, compels states to extend their ballot receipt deadlines further and further or to allow voters to cure their ballots. *See New Georgia Project,* 976 F.3d 1278; *Hobbs,* 18 F.4th 1179. In the end, there is practically no risk that *the government* will erroneously deprive any putative voter of any right they may have so long as they follow instructions in a reasonably timely manner.

In any event, the assertion that the cure period is too short lacks merit. The government has an interest in bringing election activities to a close, and the statutory cure period reflects this interest. The seven-day period adopted by the legislature represents a reasonable balancing of the state's interest in promoting confidence that its elections are

secure, providing voters every reasonable opportunity to complete the voting requirements, and providing for outcomes to be decided in a timely fashion. SB 418 goes well beyond the substantive constitutional minimum by any measure because there is no procedural due process right to a cure period at all, even for voters denied access to the ballot at the polls on election day on account of faulty identification.

In state after state, voters who do not bring the required valid identification with them on election day are turned away from the polls with no post-election cure opportunity. That flows directly from *Crawford*. And SB 418 is *at least two steps* more generous than the identification law at issue in *Crawford*. First, it does not apply to voters, but only to same-day registrants–i.e., people who have not yet qualified as voters. And second, it gives same-day registrants a full week to cure their failure. The seven-day period is a matter of legislative grace, not a constitutional violation. In fact, courts routinely hold that election-day deadlines for ballots to be received and minimal or even no period in which to cure ballot defects do not run afoul of constitutional guarantees. *See Yazzie v. Hobbs,* 977 F.3d 964 (9th Cir. 2020); *Northeast Ohio Coal. For the Homeless v. Larose,* 2024 WL 83036 (N.D. Ohio Jan. 8, 2024); *Pennsylvania Democratic Party v. Boockvar*, 238 A. 3d 345, 372-74 (Pa. 2020).

Finally, the radical implications of Plaintiffs' dual claim that the seven-day cure period is both too short to satisfy their voters' purported rights and too long under Article 32 must emphasized. If the cure period is both too long and too short then what Plaintiffs are really saying is that, having afforded people the privilege and convenience of same-day registration, the state is constitutionally disabled from requiring any form of photographic proof of identity before it counts the ballots of such putative voters. Again, per Plaintiffs, this is not

because photographic proof of identity violates any *substantive* right held by any New Hampshire citizen. It is because procedural due process actually imposes a substantive limit on New Hampshire's election regulation. The demands of procedural due process, the argument goes, actually prohibit New Hampshire from verifying the identity of same-day registrants through photographic identification *before* it counts their ballots. As a result, New Hampshire must run the risk of having elections for offices–up to and including President of the United States–determined on the basis of unverified and potentially invalid ballots. And it means that it must do so not because it lacks constitutional authority to require photographic documentation. But only because it chose to expand voting access through same-day registration. That is absurd.

Plaintiffs' assertions that SB 418 interferes with their liberty interests in "avoiding criminal penalties such as incarceration" and "not being placed on list of allegedly fraudulent voters" are badly flawed, both legally and factually. Intervenors concede the trivial points that all New Hampshire citizens have a liberty interest in not being incarcerated. The problem for Plaintiffs is that enforcement of SB 418 does not threaten to deprive them of that interest in any way–or at least not any more than the enforcement of any other law that carries criminal penalties. It should go without saying that the mere fact that a law carries unwanted criminal penalties does not state a claim for a violation of the due process clause. Further, SB 418 does not alter the process due to any criminal defendant. If enforcement of SB 418 ever threatened the liberty of any of Plaintiffs' members to be free from incarceration, those members would be afforded every procedural right New Hampshire guarantees to any other criminal defendant. In sum, Plaintiffs fail to make out a procedural

due process claim premised on their liberty interest in staying out of jail because enforcement of SB 418 is not different than enforcement of any other law with criminal penalties and it does not alter the process due to any person alleged to have violated it.

Intervenors also concede the equally trivial point that citizens have a constitutionally protected liberty interest in not being subject to "governmental action that seriously damages their standing in the community." *Petition of Bagley,* 128 N.H. 275, 284 (1986). The problem for Plaintiffs, again, is the SB 418 does not contemplate any such governmental action. It, therefore, does not implicate any liberty interest, resolving Plaintiffs' procedural due process at the threshold of the inquiry.

Plaintiffs assert that SB 418 mandates the creation of a list of "allegedly fraudulent voters." Not so. It mandates only that the government document the "names of affidavit voters whose verification letters are either not returned to the secretary of state or which do not provide the required voter qualifying information." RSA 659:23-a, VII. Absent Plaintiffs' hyperbole regarding lists of "allegedly fraudulent voters," their claim falls apart. The complaint contains no facts to suggest that mere inclusion on a list of persons who failed to complete the affidavit ballot process seriously damages one's standing in the community.

Nothing in *Bagley* saves Plaintiffs' facially deficient complaint. *Bagley* is worlds away from SB 418. In that case, the government had included the Bagley's on a list of people it had "probable cause" to believe had abused or neglected children. The Court, quite reasonably, concluded that their inclusion on such list "stigmatized" them and risked subjecting them to "opprobrium." *Bagley,* 128 N.H. at 284.

Unlike the list in *Bagley*, the list SB 418 mandates does not carry with it any presumption or implication of wrongdoing. Plaintiffs' allegation to the contrary–that the list that identifies "allegedly fraudulent voters"–finds no support in the text of the law. Rather, the names included on the list are precisely what they purport to be: the names of people who began but did not complete the affidavit ballot process. Unlike being a child abuser or child neglecter, there is nothing inherently wrong or unlawful about failing to complete that process. And, again, as Plaintiffs themselves note, there are many innocent reasons for failing to complete the affidavit ballot process. The same cannot be said about abusing or neglecting a child in one's care. In any event, *Bagley* would not entitle Plaintiffs to the relief they seek as *Bagley* did not enjoin the government from keeping lists, whereas that is what Plaintiffs seek in this case.

In short, the facts as alleged in the complaint suggest nothing derogatory whatsoever about the person and cannot remotely be considered to carry the kind of "public opprobrium" present in *Bagley*.

V. Conclusion

For the foregoing reasons, the Complaint should be dismissed.

WHEREFORE, Intervenor-Defendants respectfully move that this Honorable Court:

A. Dismiss the Complaint; and
B. Grant such other relief as may be just and proper.

Respectfully Submitted
REPUBLICAN NATIONAL COMMITTEE

And

NEW HAMPSHIRE REPUBLICAN
STATE COMMITTEE

By their attorneys,
Lehmann Major List, PLLC

February 5, 2024 */s/ Richard J. Lehmann*

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CERTIFICATION

I hereby certify that a copy of this pleading was this day forwarded to counsel of record in this matter via the Court's electronic filing system.

February 5, 2024 */s/ Richard J. Lehmann*

Richard J. Lehmann

Exhibit 1

THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS. **SUPERIOR COURT**

Maxine Mosley and Donna Soucy

v.

David Scanlan, New Hampshire Secretary of State

Docket No.: 217-2022-CV-01067

ORDER ON REQUEST FOR PRELIMINARY INJUNCTION

The plaintiffs, Maxine Mosley and Donna Soucy, filed suit against the defendant, New Hampshire Secretary of State, David Scanlan, requesting preliminary and permanent injunctive relief to enjoin the defendant from conducting a review of the race for State Representative Hillsborough District 16 noticed for November 21, 2022, at 4:00 pm. Larry Gagne filed a motion to intervene, which the Court granted. The Court held a hearing on the plaintiff's request for preliminary relief on November 21, 2022 at 1:00 pm. Prior to the hearing, the defendant delayed any further review until the morning of November 22, 2022 to allow this complaint to be considered. For the following reasons, the Court DENIES the plaintiffs' request for preliminary relief and ORDERS the defendant to conduct a review of all votes cast in the race for State Representative Hillsborough District 16 pursuant to the Rules of Procedure for Recounts (Court index #1, Ex. C.).

Factual Background

On November 8, 2022, the State of New Hampshire conducted a general election. (Court index #1 ¶ 25.) The ballot in Hillsborough District 16 listed four candidates for State Representative. (Id. ¶ 26.) Each voter could select two out of the four candidates. The two candidates receiving the most votes would be elected to the New Hampshire House of

Representatives. (Id.) Only voters in Manchester, New Hampshire, Ward 6 voted for the State Representative race in Hillsborough District 16. (Id.)

On Election Day, the Return of Votes Form completed by election officials in Manchester Ward 6 reflected 4,001 ballots taken and cast. (Id. ¶ 27-28.) The votes by candidate for State Representative were: (1) William Infantine (R): 1,895 votes; (2) Larry Gagne (R): 1,820 votes; (3) Maxine Mosley (D): 1,797 votes; and (4) Holly Hillhouse (D): 1,644 votes. (Id. ¶ 29.)

Plaintiff Mosley filed an application for a recount pursuant to RSA 660:1. (Id. ¶ 30.) On November 14, 2022, the defendant's office conducted the recount. (Id. ¶ 31.) The defendant released Rules of Procedure for Recount which provided, in part, "[i]f there is a challenge of any ballot, it must be made immediately and the Secretary of State will rule on such challenge. If that decision is protested, the Secretary of State will attach on the protested ballot a statement of fact." (Id. ¶ 33, Ex. C.) The Rules further provided that "at the completion of a recount [the Secretary of State] will announce the official winner based on the recount figures." (Id.) Eight ballots were protested and preserved for appeal in the recount for Hillsborough District 16 State Representative.[1] (Id. ¶ 34.)

The votes by candidate after the recount were: (1) William Infantine (R): 1,877 votes (reduction of 18)[2]; (2) Maxine Mosley (D): 1,799 votes (increase of 2); (3) Larry Gagne (R): 1,798 votes (reduction of 22); and (4) Holly Hillhouse (D): 1,643 votes (reduction of 1). (Id. ¶ 35, Ex. D.) The defendant "declared the results and announced Plaintiff Mosley as the 'official winner based on the recount figures.'" (Id. ¶ 36.) The declaration was made in the presence of

[1] At the hearing, the parties represented that seven, not eight, ballots were protested during the recount and preserved for appeal at the Ballot Law Commission.
[2] As compared to Election Night results.

Ms. Mosley, the recount observers, and counsel. (Id.) The defendant then published the recount vote tally. (Id. ¶ 37, Ex. D.)

The race for Hillsborough District 16 was selected for audit pursuant to RSA 660:17-a. (Id. ¶ 42.) The audit reflected that 3,996 ballots were cast in Manchester Ward 6, compared to the 4,001 originally calculated. (Id. ¶ 43-44.)

Immediately following the announcement of the recount vote tally, the defendant's recount officials continued working on the recount by conducting vote reconciliation. (Court index # 8 at 2.) The reconciliation process entails "comparing the total number of ballots cast, the sum of votes cast plus undervotes and overvotes, and the number of voters checked in as having voted on Election Day." (Id.) The total number of ballots cast should be equivalent to the other factors. (Id. at 3.) The reconciliation paperwork showed the number of ballots counted was 23.5 ballots lower than the number counted of the same ballots cast for the statutorily prescribed audit count of the Governor's race and 28.5 ballots lower than Election Day records. (Id.) The defendant determined that it was likely that one stack of uncounted ballots was inadvertently included in a stack of counted ballots, resulting in approximately 25 votes uncounted. (Id.)

On November 17, 2022, the defendant issued a Notice regarding the Hillsborough County State Representative District 16 election. (Court index #1 ¶ 50, Ex. A.) The Notice announced that "[b]allot counting will be continued in the Hillsborough County State Representative District 16 recount." (Id., Ex. A.) The Notice stated two reasons for the continuation of the recount: (1) "[t]he routine recount reconciliation process . . . indicated that, . . . reconciliation numbers and recount reconciliation numbers were not equivalent" and (2) the audit in the race for Governor "disclosed that the total number of ballots cast and counted for the office of Governor in this

district is greater than the total accounted for so far in for the Hillsborough County State Representative District 16 race." (Id.) The Notice announced that the continuation of the recount would commence on Monday November 21, 2022, at 4:00 pm. (Id.)

On November 17, 2022, Mr. Gagne filed a written appeal to the Ballot Law Commission pursuant to RSA 665:8. (Court index #2 ¶ 1.)[3]

Legal Standard

"The issuance of injunctions, either temporary or permanent, has long been considered an extraordinary remedy." New Hampshire Dep't of Env't Servs. v. Mottolo, 155 N.H. 57, 63 (2007). "A preliminary injunction is a provisional remedy that preserves the status quo pending a final determination of the case on the merits." Id. The Court will not grant a preliminary injunction unless the party requesting the injunction shows: (1) that they "would likely succeed on the merits"; (2) that they have "no adequate remedy at law"; and (3) that "there is an immediate danger of irreparable harm to the party" if the injunctive relief is not granted. Id. "It is within the trial court's sound discretion to grant an injunction after consideration of the facts and established principles of equity." Id.

Analysis

The plaintiffs argue that the Secretary of State maintains no statutory authority to sua sponte order a second recount of election results, precluding the noticed continuation of ballot counting. The defendant contends that the count scheduled for November 21, 2022, at 4:00 pm is not a second recount but a continuation of the original recount spurred by inequivalent

[3] Mr. Gagne's appeal concerns only the eight (or seven) ballots protested during the recount. Mr. Gagne's appeal does not impact the jurisdiction of this Court to determine whether further review of the recount is necessary or in violation of the defendant's authority. Mr. Gagne's appeal and this proceeding run parallel to each other.

reconciliation results. Therefore, the defendant argues that the bar on second recounts does not apply, and he is solely carrying out his responsibility to count every vote.

Generally, only one recount is permitted and only in certain circumstances. RSA 660:3 provides that "[i]f more than one candidate for the same office in the same district applies for a recount under this chapter, and a recount is completed, such applications shall not results in a second recount." Further, RSA 660:5 provides that "[i]n no event shall a discrepancy result in a second recount for the same candidate[.]" The only permissible circumstance where a second recount is authorized is pursuant to RSA 660:17-b. RSA 660:17-b allows for a "full recount of any race where there is a discrepancy of greater than one percent from the election results reported to the secretary of state." The parties dispute whether this provision applies only to top ballot races such as President, United States Senate, United States House of Representatives, and governor or to any race on the ballot. The Court need not make such a determination as the defendant does not seek authorization to conduct a second recount pursuant to RSA 660:17-b, IV.

During a recount of an election, the Secretary of State shall count each of the ballots cast. RSA 660:5. The defendant believes that not all ballots cast during the election were counted during the recount. The defendant presumes that when his office conducted the recount, a stack of 25 ballots was inadvertently placed on a stack of 100 ballots and the entire stack of ballots was calculated to only include 100 ballots. This assumption is based on the procedure of a recount. The ballots where a voter cast both of their permitted votes for State Representative for the same party were gathered in groups of 25 ballots in piles of 4, equaling 100 ballots per pile. The defendant presumes that a counter accidentally placed an uncounted group of 25 Republican ballots on a pile already consisting of 100 ballots, equaling 125, but only counting for 100. This

discrepancy aligns with the reduction of 18 and 22 votes for Mr. Infantine and Mr. Gagne, respectively, and the difference between the total amount of ballots counted during the recount compared to the audit of the Governor's election. Due to these discrepancies, the defendant cannot satisfactorily certify the results of the State Representative District 16 election.

The defendant's plan is to:

> - Complete an inventory of all ballots cast in Manchester Ward 6 (to confirm a number equivalent to that counted in the governor's race audit count); and
> - Then tally the ballots cast for the two candidates whose vote totals dropped significantly.

(Court index #8 at 4.) The two candidates whose vote totals dropped significantly are William Infantine and Larry Gagne. The defendant does not propose to only count the uncounted ballots, because there is no way to know which ballots may have been left uncounted. Because the defendant seeks to review votes already counted in the recount, his planned course of action would effectively be a second recount, and not solely a continuation of the initial recount. The defendant does not maintain statutory authority to reconcile the results of a recount nor authorize a continuation of a recount. RSA 660:5 and 660:6 prescribe the conduct of a recount and declaration of a winner. Neither statute authorizes a reconciliation process after a recount, continuation of a recount after a winner is declared, nor a second recount. Further, there is no history of conducting a reconciliation after a recount. A statutory analysis alone, requires the Court to find in favor of the plaintiffs. However, the Court does not agree with the plaintiffs that the defendant is barred from conducting further review of the ballots in this circumstance.

While the Court does not have adequate evidence to adopt the defendant's presumption that a stack of 25 ballots was mistakenly left out of the count, it accepts that the defendant's theory is a likely explanation. While there are numerous possible reasons the recount reflected different vote allocations than Election Night, a mistaken allocation of 25 ballots lines up closely

with the reduction in votes for Mr. Infantine and Mr. Gagne and the difference between the total amount of ballots counted during the recount compared to the total amount of ballots counted in the audit of the Governor's race. This alleged administrative error during the tallying of the recount supports the defendant's reasons for conducting another review of the ballots. Although courts generally do not become involved in political matters, see Stickney v. Town of Salem, 96 N.H. 500, 501 (1951), this matter concerns a full and fair review of election results, not the weighing of one political position over another. The Court does not presume the results of a full review, only that the defendant's determination that an administrative error occurred, potentially resulting in erroneous recount results, is credible.

Ordinarily the defendant does not maintain the authority to review a recount of an election. This matter stands apart from ordinary circumstances. When weighing the value of statutory election requirements against the accurate count of the people's will, the New Hampshire Supreme Court stated that, "[t]he question to be decided is not whether some election officer has followed the requirements of the statute. . . . The issue is: What was the legally expressed choice of the voters?" Nickerson v. Aimo, 110 N.H. 348, 351 (1970). "In resolving election difficulties of this nature, care must be taken that the matter is not decided on the basis of unwarranted technicalities. The goal must be the ascertainment of the legally expressed choice of the voters." Opinion of the Justices, 116 N.H. 756, 759 (1976); see also Opinion of the Justices, 114 N.H. 784, 786 (1974) (strict compliance with technical form of vote must yield to recognition of voter's indication of intent). "The object of election laws is to secure the rights of duly qualified voters, and not to defeat them." Opinions of the Justices, 116 N.H. at 759.

A review of the recount tabulation is required to ensure the expressed will of the Manchester Ward 6 voters is heard and the candidate with the most votes is seated as their State

Representative. While the defendant's announcement of Ms. Mosley as the winner presents complexity, the greatest weight must be attributed to the complete and lawful count of the votes cast to determine the will of the people. The defendant's alleged clerical error which may have altered the results of the recount tally compels this Court to allow additional review of the ballots to determine that the expressed choice of the voters is the final outcome. Further, there is minimal, if any, prejudice as no candidate has been sworn into office, engaged in legislative functions, and there is time to remedy any potential errors in the recount before the next legislative session. This extraordinary circumstance requires an atypical remedy. The Court permits the defendant to continue his review of the recount but such review must include all ballots cast, not just ballots cast for certain candidates. The process shall ensure full transparency and abide by the rules promulgated by the defendant in the Rules of Procedure for Recounts applied to the initial recount.

The plaintiffs fail on this first prong of the preliminary injunction test because they did not demonstrate a likelihood of success on the merits. The Court need not address whether there is an adequate remedy at law nor whether the plaintiffs face an immediate danger of irreparable harm. See Canty v. Hopkins, 146 N.H. 151, 156 (2001) (holding that the Court need not consider party's remaining arguments where one or more was dispositive of the case).

Conclusion

The Court DENIES the plaintiffs' request for preliminary relief. The defendant is ordered to conduct his noticed review of the State Representative Hillsborough District 16 election pursuant to the Rules of Procedure for Recounts utilized for the original recount in this matter. The defendant must review all ballots, not just those where voters selected Mr. Infantine and Mr. Gagne.

SO ORDERED.

November 22, 2022

Amy L. Ignatius
Presiding Justice

Clerk's Notice of Decision
Document Sent to Parties
on 11/22/2022