THE STATE OF NEW HAMPSHIRE

SUPREME COURT
2024 TERM
NO. 2024-0247

DEMOCRATIC NATIONAL COMMITTEE and
NEW HAMPSHIRE DEMOCRATIC PARTY,

v.

DAVID M. SCANLAN, in his official capacity as the New Hampshire Secretary of State, and JOHN M. FORMELLA, in his official capacity as the New Hampshire Attorney General

REPLY TO INTERVENORS' OBJECTION TO PLAINTIFFS' MOTION FOR EXPEDITED APPEAL

1. Plaintiffs seek to expedite this appeal so that the constitutionality of Senate Bill ("S.B.") 418 can be resolved in time for state officials to implement the Court's decision in the upcoming elections. Defendants—Secretary of State Scanlan and Attorney General Formella—take no position on plaintiffs' motion. Only intervenors object, but their objections lack merit.

2. *First*, intervenors' assertion (Obj. ¶2) that there is "no justification for fast-tracking this case," ignores the stated (and obvious) justification: the upcoming elections. Intervenors note (*id.* ¶5) that the state has "conducted numerous elections" since the enactment of S.B. 418 and claim that "nothing … suggests that any harm whatsoever arose." There is simply no basis for that claim. As an initial matter, the only elections since S.B. 418's enactment have been low-turnout local and special elections, and the recent presidential primary—none of which were remotely on the scale of the upcoming November elections. Indeed, there were more than *75,000* same-day registrants in the

November 2020 general election (Compl. ¶38), an indication of the stakes at issue in this appeal. Moreover, by preventing election officials from complying with the five-day deadline in part 2, article 32 of the state constitution, S.B. 418 deprives voters and candidates of the timely vote tally that the constitution guarantees. That harm occurs in every election (absent the very unlikely circumstance of there being no affidavit-ballot voters at all or of every affidavit-ballot voter returning verification documents at least two days before S.B. 418's seven-day deadline, and all of those documents being deemed adequate). Expedited consideration is warranted to prevent the 2024 elections from being conducted in violation of article 32.

3. *Second*, intervenors accuse plaintiffs of failing to "zealously pursue their purported rights," Obj. ¶7, repeatedly suggesting that plaintiffs were dilatory in bringing their lawsuit, *see id.* ¶¶3, 6, 9, 16, 19-22, 26-27. That is false. Two other sets of plaintiffs challenged S.B. 418 shortly after its enactment, with one set raising the same article 32 claim raised here. *See 603 Forward v. Scanlan*, 2023 WL 7326368, at *2 (N.H. Super. Ct. Nov. 3, 2023). Plaintiffs here thus reasonably conserved judicial and the state defendants' resources by allowing those cases to play out instead of bringing a duplicative action. When those lawsuits were dismissed on standing grounds, *see id.*, plaintiffs promptly filed this action and sought preliminary injunctive relief. *See* Complaint, *Democratic National Committee v. Scanlan*, No. 226-2023-CV-00613 (N.H. Super. Ct. Dec. 22, 2023).

4. Intervenors contend, however (Obj. ¶16), that plaintiffs did not sue quickly enough because they waited until after the time for appeal in the prior case raising the

article 32 claim expired. That is not dilatory. Plaintiffs reasonably waited to see if the article 32 claim might yet be resolved in the earlier case (as the filing of an appeal would have indicated); when it was clear that would not be the case, plaintiffs filed both their complaint and preliminary-injunction motion in just over two weeks. Finally, intervenors are wrong that plaintiffs never sought accelerated consideration below. Obj. ¶7. Plaintiffs moved for a preliminary injunction when they filed their complaint, which resulted in expeditious review of both the preliminary-injunction motion and the motions to dismiss. Indeed, had plaintiffs brought this lawsuit any earlier, intervenors likely would have argued that plaintiffs had sued too *soon*—as the state asserted in a prior challenge to S.B. 418, *see 603 Forward*, 2023 WL 7326368, at *1.

5. *Third*, intervenors say (Obj. ¶8) that plaintiffs' article 32 claim "is dubious on its face." For starters, that has no bearing on the request for expedition; to the contrary, the entire rationale for expedition is to resolve any "dubious[ness]" about the constitutionality of S.B. 418 before the upcoming elections. In any event, the claim is sound. Indeed, Secretary Scanlan himself warned members of the legislature during their consideration of the bill that "Part 2, Article 32 of the Constitution" may not allow S.B. 418's "novel version of a provisional ballot" that "would be discounted from the election" "if the voter d[oes] not respond to [a] request for documentation" within seven days. Compl. Ex. B, at 10. Those warnings were well-founded: The New Hampshire Constitution requires that city and town clerks report the tally of qualified votes of an election to the secretary of state "within five days following the election," N.H. Const. pt. 2, art. 32, whereas S.B. 418 precludes a final count of qualified voters' ballots until at

least "the seventh day after the election," S.B. 418 §2, V, making it impossible for city and town clerks to comply with the constitutionally mandated five-day reporting period. Intervenors do not even attempt to dispute this reasoning in their objection, instead resorting to mere labeling in calling the argument "novel." Obj. ¶¶1, 8, 25-26. But again, there is no reason why any "novelty" supports denying expedition (certainly intervenors offer none). Novel or not, the purely legal question plaintiffs raise warrants resolution to provide clarity to the officials who will be conducting the upcoming elections.

6. *Fourth*, intervenors complain that it is "fundamentally unfair," Obj. ¶9, to ask them—parties that chose to intervene in this litigation—to draft their response brief within twenty days, *id.* ¶¶24, 26. As just noted, this appeal turns on a single question of law (as does defendants' cross-appeal). Especially given that the parties just briefed and argued these issues to the trial court, twenty days is sufficient for intervenors' counsel to prepare a response brief. That intervenors themselves (as opposed to their counsel) are busy with "other activities throughout New Hampshire and throughout the Nation," *id.* ¶9, is irrelevant, since it is of course counsel who will prepare their brief. Likewise, the fact that intervenors' counsel have obligations to another client through May 23 does not preclude them from filing a brief by May 30; it is utterly commonplace for attorneys to work on more than one matter at a time. In any event, plaintiffs are amenable to any schedule that would allow this Court to issue its decision by July 30 (which defendants offered during the proceedings below as a date providing them sufficient time to implement any decision on the constitutionality of S.B. 418).

7. In short, intervenors' objection confirms that there is no sound basis to deny expedition. The motion to expedite should be granted and plaintiffs' proposed briefing schedule adopted.

Dated: May 7, 2024

Respectfully submitted,

DEMOCRATIC NATIONAL COMMITTEE, NEW HAMPSHIRE DEMOCRATIC PARTY,

DAVID M. SCANLAN, and JOHN M. FORMELLA,

REPUBLICAN NATIONAL COMMITTEE, and NEW HAMPSHIRE REPUBLICAN STATE COMMITTEE

/s/William E. Christie

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**Pro hac vice applications forthcoming*

CERTIFICATE OF SERVICE

Pursuant to this Court's Rule 26(3)(b), a copy of the foregoing was transmitted by electronic filing to all counsel of record on this 7th day of May, 2024.

/s/William E. Christie

William E. Christie