THE STATE OF NEW HAMPSHIRE SUPREME COURT
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

Case No. 2024-0247

Rule 7 Mandatory Appeal
From Merrimack Superior
Docket No. 226-2023-CV-00613

SUPPLEMENTAL MEMORANDUM OF LAW OF INTERVENORS REPUBLICAN NATIONAL COMMITTEE and NEW HAMPSHIRE REPUBLICAN STATE COMMITTEE

QUESTIONS PRESENTED

1. Does the principle set forth in *Purcell v. Gonzalez*, 549 U.S. 1, 4-6 (2006), which this court applied in case no. 2018-0208, *Petition of New Hampshire Secretary of State & a.* (Oct. 26, 2018), militate against this Court's issuance of a decision in this appeal prior to November 6, 2024?

2. In light of the recent enactment of HB 1569, which fully repeals the challenged statutory provisions and eliminates the legal basis for plaintiffs' claims, should the Court find that this appeal will be moot as of November 11, 2024?

BACKGROUND

In this case, Appellants challenged the constitutionality of SB 418, which requires persons seeking to register to vote in New Hampshire for the first time on Election Day to provide photographic identification either at the polling place or to cure that deficiency by submitting a copy of such identification within seven days thereafter. Appellants alleged that SB 418's cure process violates Article 32 of the New Hampshire State Constitution by supposedly rendering it impossible for "moderator[s]" to count the votes of persons "qualified to vote" and for "town or city clerk[s]" to direct the results of those counts "to the secretary of state" within "five days following the election."

Appellants filed their complaint on December 12, 2023, a year and a half after the passage of SB 418 on June 17, 2023. The complaint had two counts: an Article 32 count and a second count alleging that SB 418 violates voters' procedural due process rights. On December 22, 2023, Appellants moved for preliminary relief on both counts. On April 16, 2024, the superior court dismissed the Article 32 count for failure to state a claim. It denied motions to dismiss filed against the procedural due process count. As for preliminary relief, the superior court denied Appellants' motion on the procedural due process count. And it said nothing about Appellants' motion

on the Article 32 count, presumably because it determined that Appellants had failed to even state a claim, let alone a claim that warranted preliminary relief.

Appellants timely appealed. They sought expedited treatment of this appeal, which this Court rightly denied after fulsome briefing. Briefing on the merits concluded on August 15, 2024. Oral argument is set for October 10, 2024.

On September 29, 2024, this Court requested supplemental briefing on the two questions presented.

ARGUMENT

I. Neither the *Purcell* Doctrine Nor Impending Mootness Militate Against This Court Affirming the Judgement Below.

Neither the *Purcell* Doctrine nor impending mootness presently impose any obstacle to this Court affirming the judgment below. An order affirming the superior court's judgment would, consistent with *Purcell* principles, preserve the status quo. The state would simply implement SB 418 in the upcoming election, as voters now expect it to do and as it has done in every election conducted in this state since January 1, 2023, including two statewide primary elections. And Appellants' case would be dismissed for failure to state a claim well before it becomes formally moot on November 6, 2024. *See infra.*

Moreover, this Court *should*, if it can do so before November 6, 2024, affirm the judgment below for all the reasons set forth in the briefs of Appellees and Appellees-Intervenors, any one of which is sufficient to end this case. Article 32 does not confer any rights on Appellants. Int. Br. at 13-16. SB 418 is consistent with Article 32's requirements. *Id.* at 16-20. Appellants' facial challenge fails. *Id.* at 20-22. Article 32 is unenforceable because it was not properly ratified. *Id.* at 22-26.

II. Alternatively, the Court Should Dismiss this Case as Moot Because Courts Cannot Afford Appellants Meaningful Relief Either Before or After Election Day.

Unless this Court affirms, any relief for Appellants in this case will either run afoul of the *Purcell* doctrine, if granted before Election Day, or the mootness doctrine, if granted thereafter. Accordingly, unless the Court affirms the lower court's judgment before November 6, 2024, it should recognize that this appeal is functionally moot and dismiss it. *See Reynolds v. Sims*, 377 U.S. 533, 585 (1964) (noting that in the context of an impending election courts "should act and rely upon general equitable principles").

This case becomes formally moot on November 6, 2024. As of that date, the law at issue becomes permanently inoperative and incapable of inflicting any harm on Appellants whatsoever. The general court has repealed the law, effective November 11, 2024, and there are no elections between

November 6 and November 11 during which the law might be enforced against Appellants.

There can be little doubt that the repeal of SB 418 moots the merits of this case after Election Day. Generally, a case "is moot when" the "issues involved have become academic or dead." *Appeal of Hinsdale Federation of Teachers*, 133 N.H. 272, 276 (1990). Whether a law that is no longer in force ran afoul of constitutional limits when it was on the books is a classic example of an academic question. *See Lewis v. Continental Bank Corp.*, 494 U.S. 472, 479-80 (1990) (cautioning against "unnecessary judicial pronouncements on even constitutional issues" where case was mooted by alteration of underlying statutory scheme); *New Hampshire Ass'n of Ctys. v. State*, 158 N.H. 284, 292 (2009) (same); *Arc of Cal. v. Douglas*, 757 F.3d 975, 982 (9th Cir. 2014) (same); *Dearmore v. City of Garland*, 519 F.3d 517, 525-26 (5th Cir. 2008) (same).

No exception to the mootness doctrine applies to the merits of this case. First, the voluntary cessation doctrine is inapplicable because there is no evidence that the state intends to reinstate SB 418 upon dismissal of this case. *See Bd. of Trustees of Glazing Health & Welfare Tr. v. Chambers*, 941 F.3d 1195, 1198-99 (9th Cir. 2019); *Libertarian Party of Ark. v. Martin*, 876 F.3d 948 (8th Cir. 2017); *McCorvey v. Hill*, 385 F.3d 846 (5th Cir. 2004). To the contrary, the legislature has enacted an entirely new regime under which it expects future

elections to be conducted. Laws 2024, ch. 378. Nor does this case present an issue that is capable of repetition yet evading review. *See Appeal of Hinsdale Federation of Teachers*, 133 N.H. at 276. Appellants have had over two years to pursue their challenge against SB 418. Although they squandered nearly a year of that time by waiting until December 2023 to initiate this case, there is no doubt that they have had ample time to secure judicial review. There is no reason to believe the same would not be true if the general court were to ever re-enact SB 418. And, in fact, litigation is already underway against the successor law to SB 418, long before any election in which it might apply.

Finally, the merits of this case do not present an issue of "pressing public interest." *S.D. v. N.B.*, 176 N.H. 44, 47 (2023). At the outset, it is not clear that the "pressing public interest" exception is separate and distinct from the "capable of repetition yet evading review" exception. *See id.* But, in any event, the merits of this case do not fit within the scope of the exception. SB 418 has been repealed. It has been replaced with something entirely new and distinct. And there is no indication it will ever be enforced again. Accordingly, questions about whether its enforcement infringes upon the right to vote are more aptly characterized as "academic" rather than "pressing."

In this case, the *Purcell* doctrine forecloses the possibility of resolving this case before it becomes moot after Election Day. The superior court has

not yet conducted any proceedings on the merits of Appellants' Article 32 claim, including in the context of preliminary relief. To be sure, the parties have briefed the question of a preliminary injunction, but the superior court did not have occasion to address it since it concluded that Appellants had failed to state a claim. *See* NOA, Order at 14 (N.H. April 16, 2024). Further, the parties have not yet briefed the question in the context of the impending election, which affects important and relevant considerations like the public interest and the balance of the equities. Accordingly, unless this Court affirms the dismissal for failure to state a claim, the next step would be to remand to the superior court for further proceedings. At that point, the superior court would have to confront the implications of *Purcell*. And this Court would have to confront its implications if the lower court ignored them.

The *Purcell* doctrine would preclude *any court*, including this Court, from granting Appellants any of their requested relief, even on a preliminary basis, before Election Day. That is because, as this Court has recently and explicitly held, the doctrine is a well-founded admonition to courts to decline to "interfere with a fast-approaching election." Order, *Petition of New Hampshire Secretary of State & a.*, No. 2018-0208, at 2 (N.H. Oct. 26, 2018) (citing *Veasey v. Perry*, 769 F.3d 890, 896 (5th Cir. 2014)). In fact, under *Purcell*, this Court would be obliged to unwind any relief the superior court did award

Appellants, as it had to do in another election case just a couple of years ago. *Norelli v. Sec'y of State*, 175 N.H. 186, 200 (2022).

Here, there is every reason to apply *Purcell* in any proceedings following a remand. The 2024 presidential election is "fast-approaching." Indeed, in many respects, it is already upon us. By the time this Court hears oral argument in this appeal on October 10, 2024, New Hampshire will have already started sending ballots to eligible absentee voters. *See,* RSA 657:19(I)(b); Nat'l Conf. of State Legis., Table 7: When States Mail Out Absentee/Mail Ballots, NCSL, https://www.ncsl.org/elections-and-campaigns/table-7-when-states-mail-out-absentee-mail-ballots. On that date, Election Day will be a mere 26 days away. Election Day will be closer still by the time the superior court can receive and adjudicate motions for preliminary relief, and even more imminent by the time this Court can resolve appeals regarding any such preliminary relief. In that context, this Court may very well find itself, as it has in the past, in the unenviable position of invoking *Purcell* in an emergency posture to unwind a lower court injunction against a legislative enactment on the eve of an election.

Further, the risks that the *Purcell* doctrine counsels courts to avoid are all materially present in this case.

First, there is a grave risk of voter confusion as the case bounds between courtrooms and the rules governing identification requirements for individuals seeking to register on election day who may participate in the upcoming election are shaped and re-shaped by differing and conflicting court orders. *Purcell*, 549 U.S. at 4-5 (2006). Here, for example, the scope of any relief Appellants might secure is entirely uncertain. As Intervenors have argued, even if the merits were justiciable (they are not) and even if preliminary relief were warranted (it is not), the proper remedy may be simply to reduce the cure period from seven days to five days. Int. Br. at 35-37. After all, a cure period of five days would fully remedy whatever "Article 32 harm" SB 418 allegedly inflicts on Appellants. The potential for voter confusion is obvious, particularly as this issue ping-pongs rapidly between the Superior Court and this Court.

Second, there is also a serious risk of administrative chaos. *Id.* Officials charged with administering the election must digest each new court order and, on increasingly compressed timeframes, communicate its meaning throughout their organizations and train their employees to implement it. This close to the election, the likelihood of inconsistent administration and follow-on litigation arising from such inconsistencies approaches certainty.

Third, there is a substantial risk that judicial intervention at this late date will undermine the public's trust and confidence in the election, which is critical to any well-functioning democracy. Order, *Petition of New Hampshire Secretary of State & a.*, No. 2018-0208, at 2 (N.H. Oct. 26, 2018) (noting that potential inconsistencies in voter registration procedures can "impair the public interest") (citing *Veasey v. Perry*, 769 F.3d 890, 896 (5th Cir. 2014)). Senate Bill 418 is the work product of this state's democratically elected legislators and its governor. It is designed to enhance the public's confidence in the integrity of same day registration. It ensures that the election is not tainted with ballots from people unable to confirm their identity. And New Hampshire has implemented and enforced it in several past elections, without any appreciable controversy. Any injunction affecting its enforcement on the cusp of a high-stakes presidential election would needlessly expose New Hampshire's elections to additional risk and give skeptical voters "incentive to remain away from the polls." *Purcell*, 549 U.S. at 4-5.

Finally, Intervenors have not identified a single case involving voting procedures where courts have declined to apply *Purcell* to preserve the status quo this close to Election Day. Thus, any decision to decline to apply *Purcell*'s abstention principles from this point forward in this case would be unprecedented and, absent extraordinary justification, would further risk

inflicting serious harm on the public's confidence in this critical election that will set the course of this state and this country for at least the next four years.

In short, in the closing stage of a high-profile, consequential election for President of the United States, New Hampshire Governor, and other high offices, any relief a court might grant to Appellants before Election Day would be wholly inconsistent with the *Purcell* doctrine. It would invite realization of each of the risks the doctrine aims to prevent. And it would fundamentally alter the course of New Hampshire's democracy. At this late date, no such relief is available to Appellants.

* * *

With Election Day only a few weeks away and with the impending effective date of SB 418's repeal on November 11, 2024, there is no meaningful judicial relief available to Appellants. The *Purcell* doctrine precludes relief before Election Day. The mootness doctrine thereafter. Before the effective date of SB 418's repeal formally moots this case, this Court could affirm the Superior Court's order. But otherwise, the Court should exercise its equitable discretion and dismiss the appeal as moot.

CONCLUSION

For the foregoing reasons, the Court should either affirm the Superior Court's order or dismiss the appeal as moot.

Respectfully Submitted,

The New Hampshire Republican State Committee

By its attorneys,
Lehmann Major List, PLLC

October 3, 2024

/s/Richard J. Lehmann
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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief contains approximately 2569 words, which is fewer than the words permitted by the Court's Order. Counsel relied upon the word count of the computer program used to prepare this brief.

October 3, 2024

/s/Richard J. Lehmann
_____
Richard J. Lehmann

CERTIFICATE OF SERVICE

I hereby certify that a copy of this pleading was this day forwarded to opposing counsel via the court's electronic service system.

October 3, 2024

/s/Richard J. Lehmann
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Richard J. Lehmann