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 Court
Docket No. 226-2023-cv-00613

BRIEF OF INTERVENORS REPUBLICAN NATIONAL COMMITTEE and NEW HAMPSHIRE REPUBLICAN STATE COMMITTEE

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(15 Minutes Oral argument requested)

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TABLE OF CONTENTS

TABLE OF AUTHORITIES……………………………………………..4

STATEMENT OF CASE AND FACTS……………………..……………7

STANDARD OF REVIEW………………………………………………..10

SUMMARY OF THE ARGUMENT……………………...…....…………..11

ARGUMENT…………………………………………………...……………13

A. Plaintiffs Have Not Identified A Violation of Any Right Protected by Part II, Art. 32 of the New Hampshire Constitution……………………………………………………...……13

B. Even If Plaintiffs Had A Right Protected By Article 32, Nothing In SB418 Conflicts With The Text Of That Provision……………………………………………………………16

C. Plaintiffs Misconstrue The Standard Of Review Applicable To Facial Challenges…………………………………..……………..20

D. The "Five Day" Language In Part II, Article 32 Was Not Properly Adopted And Cannot Be The Source Of Any Claimed Right ……………………………………………..……..22

E. The Trial Court Correctly Denied Plaintiffs' Request For An Injunction…………………………….…………………………26

1. This Court Should Affirm The Trial Court's Denial Of Injunctive Relief…………………………………………………27

2. Plaintiffs Cannot Meet The Standard Of Review On Appeal………………………………….……………………..33

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F. Even If The Court Finds A Constitutional Violation, It Should Sever The Unconstitutionality And Leave The Remaining Provisions Of The Statute In Place……………………….35

CONCLUSION………………………………………………………….37

CERTIFICATE OF COMPLIANCE…………….………….……………..39

CERTIFICATE OF SERVICE……………………..………………...…….39

DECISION BEING APPEALED OR REVIEWED……………….……..41

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TABLE OF AUTHORITIES

CASES CITED

Akins v. Sec'y of State, 154 N.H. 67 (2006)………………………………......…21

Am. Fed'n of Teachers–N.H. v. State of N.H., 167 N.H. 294 (2015)……………11

Ashwander v. Tennessee Valley Authority, 297 U.S. 288 (1936)……….………26

Associated Press v. State, 153 N.H. 120 (2005)…………………………………35

Ayotte v. Planned Parenthood of Northern New Eng., 546 U.S. 320 (2006)……..…36

ATV Watch v. N.H. Dep't of Resources and Econ. Dev., 155 N.H. 434 (2007)…………………………………………………………………………26

Baer v. New Hampshire Dep't of Educ., 160 N.H. 727 (2010)……….………11, 13

Baines v. N.H. Senate President, 152 N.H. 124 (2005)………………………10, 35

Borden v. United States, 593 U.S. 420 (2021)………………….……………21

Burdick v. Takushi, 504 U.S. 428 (1992)………………………………………19

Crawford v. Marion County Election Bd., 553 U.S. 181 (2008)……………………19

Dep't of Envtl. Servs. v. Mottolo, 155 N.H. 57 (2007)……………………….27, 34

Duncan v. State, 166 N.H. 630 (2014)…………………………...…………13

Enos v. U.S. Bank, N.A., 831 F. App'x 289 (9th Cir. 2020)………………..…14

Fischer v. Governor, 145 N.H. 28 (2000)……………………..…………22, 24, 25

Food and Drug Administration v. Alliance for Hippocratic Medicine, 602 U.S. 367 (2024)…………………..………………………………32

Frost v. Comm'r, N.H. Banking Dep't, 163 N.H. 365 (2012)………….………27

Guare v. State, 167 N.H. 658 (2015)…………………..………..…………9, 21

Johnson v. Shaw, 101 N.H. 182 (1957)……………………..…………………29

Liebert v. Millis, No. 23-CV-672-JDP, 2024 WL 2078216 (W.D. Wis. May 9, 2024)……………………………………………19

Meredith Hardware, Inc. v. Belknap Realty Trust, 117 N.H. 22 (1977)……….…29

New Hampshire Democratic Party v. Sec'y of State, 173 N.H. 312 (2021)…..…21, 22

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New Hampshire Health Care Ass'n v. Governor, 161 N.H. 378 (2011)……………..…10

Pennsylvania State Conf. of NAACP Branches v. Sec'y Commonwealth of Pennsylvania, 97 F.4th 120 (3d Cir. 2024)…………………...…………19

Rabbia v. Rocha, 162 N.H. 734 (2011)………………..………………………27

Rideout v. Gardner, 838 F.3d 65 (1st Cir. 2016)…………………..…………20

Saucedo v. Gardner, 335 F.Supp.3d 202 (D.N.H. 2018)……………….………21

State v. Barrocales, 141 N.H. 262 (1996)………………………………………26

State v. Furgal, 161 N.H. 206 (2010)…………………..……………………20

Tessier v. Rockefeller, 162 N.H. 324 (2011)……………..………………………10

Texas State LULAC v. Elfant, 52 F.4th 2428 (5th Cir. 2022)…………………32

United States v. Athrex, Inc., 594 U.S. 1 (2021)……………...…………………35

United States v. Salerno, 481 U.S. 739 (1987)…………………..……………21

United States v. Rahimi, 144 S.Ct. 1889 (2024)……………………..……………21

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CONSTITUTIONAL AND STATUTORY PROVISIONS

N.H. Constitution

Pt. I, art. 3…………………………………...………………15

pt. II, art. 32……………………………………...………………*passim*

N.H. Revised Statutes Annotated

RSA 491:22……………………………..………..……………*passim*

RSA 654:7…………………………..…………..……………28

RSA 654:15………………………………………..…………28

RSA 654:32…………………………………………..…………28

RSA 654:34…………………………………………..……………28

RSA 654:34-a……………………………………..………………29

RSA 654:35……………………………………..………………29

RSA 654:38……………………………………..………………29

RSA 655:17……………………..…………………………………29
RSA 659:23-a………………………………………...…..………7
RSA 660:1……………………………………..………………18
RSA 660:2…………………………………..…………………18
RSA 660:3………………………………..……………………18
RSA 660:4……………………………..………………………18
RSA 660:5…………………………..………………...……18, 20
RSA 660:6…………………………………..…………………18
RSA 665:5………………………………...……………………18
RSA 665:16………………………………………………………18

Other Authorities

Convention to Revise the Constitution (1974)……………..…..……22, 23
45 Manual of the General Court (1977)………………...……………24

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I. STATEMENT OF THE CASE AND OF FACTS

In this state, it used to be possible for a person to register to vote on election day without showing photo identification, cast a ballot, and have that vote counted in the final tally. Even if it later became apparent that such a person was not qualified to vote, that person's vote counted toward the election's outcome. This system left our elections vulnerable to voting by persons other than qualified voters, including by way of fraud.

In 2022, the General Court and the Governor took steps to eliminate this vulnerability by enacting Laws 2022, ch. 239 (hereinafter "SB418"), which took effect on January 1, 2023. *App'x* at 31 *et seq.* Under SB418, persons seeking to register to vote in New Hampshire for the first time on election day who do not present photographic proof of identity at the polls are permitted to submit an "affidavit ballot." RSA 659:23-a, I. Those who submit affidavit ballots are then afforded 7 days within which to submit photographic proof of identity. RSA 659:23-a, II(b). The state supplies a pre-paid, pre-addressed envelope to each person who submits an affidavit ballot to facilitate submission of the required documentation. RSA 659:23-a, II(a). The affidavit ballots of those who timely submit the required documentation are included in the final tally. RSA 659:23-a, V. The affidavit ballots of those who do not do so are not. RSA 659:23-a, V.

The General Court's reasons for enacting SB418 are set forth in the "findings" section of the bill. *App'x* at 32. Specifically, it found that "over the past 45 years" preceding its passage, "New Hampshire has had 44 state elections that ended in a tie or a one-vote victory." The General Court also found in the 2016 general election, at least 10 illegal ballots were cast and

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counted by voters who admitted they were not entitled to vote. It also found that "New Hampshire law allows for votes to be cast and counted by signing an affidavit, even when the voter fails to produce documents to prove his or her identity, or that he or she is a New Hampshire citizen or an inhabitant of that town, city, ward, or district." *Id.* Accordingly, it observed that the existing law "does nothing to prevent the nullification of legitimate votes by the casting, counting and certification of illegitimate ballots."

Plaintiffs brought a two-count complaint in the Merrimack County Superior Court. Only Count I is at issue in this appeal, as plaintiffs voluntarily non-suited Court II. In Count I, plaintiffs allege SB418's allowance of seven days for affidavit registrants to cure their failure to provide adequate identification violates Part II, Art. 32 of the New Hampshire Constitution. That provision imposes an obligation upon election officials to "make a fair record of" the votes of "all the inhabitants…present and qualified to vote for senators" and to direct a "fair and attested copy" of that record "to the secretary of state, within five days following the election." In short, plaintiffs complaint is that SB418 is unconstitutional because it is *too generous* and affords *too much time* for those they purport to represent to cure their failure to arrive at the polls with adequate identification.

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To demonstrate just how bizarre this claim is, consider plaintiffs' now-defunct Count II. Given their argument that SB418's seven-day cure period is *too long* by two days, it would stand to reason that they would be satisfied with a cure period of the five-day period. But in Court II, plaintiffs made precisely *the opposite* assertion, complaining that SB418's seven-day cure period violates procedural due process because it is *insufficiently generous* and afforded *too little time* for people to cure their identification deficiencies.

All of this demonstrates what is really happening in this case. Plaintiffs are not trying to vindicate any rights protected by Part II, Art. 32. If Part II, Art. 32 has any applicability to SB418–and it does not–it would entitle plaintiffs to nothing more than a shorter cure period. But plaintiffs have no interest in that. What they want is a judicial assist in eliminating a democratically enacted law they do not like. And they want that assist without the pesky need to show that the only constitutional violation they allege–an overly generous cure period–harms them in any way whatsoever. That is not how the judicial system in this state works.

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Intervenors moved to dismiss both counts. The state defendants did the same, and additionally argued that the plaintiffs lack standing to pursue their claims.

Following a hearing, the trial court dismissed Count I. Although it concluded that plaintiffs had standing, it found that "the mere uncertainty that SB418 could prevent town clerks from complying with their constitutional duties does not create a clear and substantial conflict with the constitution…." *Add.* 52. Moving on to plaintiff's procedural due process claim, the court found that "without the benefit of a fully developed record, the Court cannot analyze the balance between the risk of deprivation of the right to vote or be elected to the State's interest in preventing voter fraud." *Add.* 58. Although not pleaded by plaintiffs, the trial court also analyzed their second claim under the Part I, Art. 11 voting rights framework described in *Guare v. State,* 167 N.H. 658 (2015), and found that, at the pleading stage, it could not find facts necessary to dismiss the case. For this reason, the motion to dismiss Count II was denied. *Add.* 58. But the court declined to issue an injunction, holding that since the plaintiffs had failed to identify a specifically named voter or

candidate whose right to vote or be elected has been infringed by SB418, they failed to demonstrate irreparable harm would result. *Add.* 59.

The trial court ordered the parties to develop an expedited discovery schedule for further development of the record. Rather than pursue that option, plaintiffs non-suited Count II and appealed the dismissal of Count I. The state defendants cross-appealed the trial court's determination ruling that plaintiffs have standing.

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) (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.*

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Because this case involves a constitutional challenge to a legislative act, the plaintiffs face a heightened burden. "The party challenging a statute's constitutionality bears the burden of proof." *New Hampshire Health Care Ass'n v. Governor*, 161 N.H. 378, 385 (N.H., 2011) (quotation omitted). "In reviewing a legislative act, [the Court will] presume it to be constitutional and will not declare it invalid except upon inescapable grounds." *Baines v. N.H. Senate President,* 152 N.H. 124, 133 (2005). "In other words, [the Court] will not hold a statute to be unconstitutional unless a clear and substantial conflict exists between [the statute] and the constitution." *Id.* (quotation omitted). This means that "a statute will not be construed to be unconstitutional when it is

susceptible to a construction rendering it constitutional." *Am. Fed'n of Teachers–N.H. v. State of N.H.*, 167 N.H. 294, 300 (2015). "When doubts exist as to the constitutionality of a statute, those doubts must be resolved in favor of its constitutionality." *Id.* (quotation omitted).

III. SUMMARY OF THE ARGUMENT

Given this procedural history, this appeal simplifies into a few discrete legal questions. First, does Court I state a claim for relief under the Declaratory Judgment Act, even though plaintiffs have not – and could not ever – make any showing that SB418 infringes upon any right of theirs that is protected by Part II, Article 32? Second, even if the court sets that aside, does SB418 violate Part II, Article 32? Third, even if the answers to the two preceding questions were yes—and they are not—a third question arises: is this a valid facial challenge justifying an injunction against any enforcement of SB418? Finally, was SB418's five-day provision properly ratified?

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The answers to those questions establish that plaintiffs' case fails four times over. First, the Court should affirm the dismissal because it is blackletter law, even under the DJA, that 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." *Baer v. New Hampshire Dep't of Educ.*, 160 N.H. 727, 730 (2010). Plaintiffs have no response. They identify no rights they have that are impaired or prejudiced by any violation of Part II, Article 32. And that is because they have no such rights. Second, and in any event, SB418 does not violate Part II, Article 32 because that provision does not set a deadline for the final tally of election results. The tallies of the city or town clerks can and do often change after the five-day period. This has been true throughout the history of this state. Third, plaintiffs simply cannot succeed on this facial

challenge because the only applications of SB418 that even conceivably violate Part II, Article 32 are those whereby the secretary of state accepts documentation submitted six and seven days after the election—applications that *benefit* the people plaintiffs purport to represent. If the Secretary were to cut off acceptance as of day 5, plaintiffs would have no constitutional complaint at all. And fourth, the relevant provision of Article 32 was passed by voters who were provided no indication about what they were voting for.

Plaintiffs must show that they prevail on each of these four issues, but they cannot carry that burden with respect to even one of them.

Notably, none of these issues relate to the purported "facts" cluttering plaintiffs' opening brief. Most of those statements are merely inflammatory, partisan jeremiads intended to denigrate photographic identification requirements. and to cast aspersions on the legislature. But none of that has anything whatsoever to do with whether the DJA provides a cause of action for this litigation, whether the legislation is consisted with Part II, Article 32, or whether plaintiffs can succeed on a facial challenge to the act, or whether the provision they rely upon even exists. These allegations should be understood for what they are: flimsy efforts to distract the Court from the manifest legal deficiencies and bizarre contradictions at the core of plaintiffs' own theory of the case.

And finally, even if plaintiffs could overcome all that, they are not entitled to an order from this Court directing the superior court to issue an injunction. They bear the burden of providing the Court with a sufficient record to justify appellate relief. Yet they have presented no factual record at all, despite the trial court having afforded them an opportunity for expedited

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discovery. Absent a factual record, including with respect to irreparable harm and the equities at stake, no injunctive relief is available to them.

The trial court's dismissal of Court I should be affirmed, as should the trial court's denial of injunctive relief.

IV. ARGUMENT

A. Plaintiffs Have Not Identified A Violation of Any Right Protected by Part II, Art. 32 of the New Hampshire Constitution.

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Plaintiffs' brief is most notable for what it lacks: A clearly identified violation of any constitutional right. Instead, they argue only that RSA 491:22, the New Hampshire Declaratory Judgment Act (the "DJA") has been construed to permit challenges to the constitutionality of actions by New Hampshire's government. True enough. But plaintiffs fail to grapple with the fact that, even under the DJA, 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." *Baer,* 160 N.H. at 730 (emphasis added). It is beyond question that an "abstract interest in ensuring that the State Constitution is observed" is insufficient grounds for a party to seek relief. *Duncan v. State*, 166 N.H. 630, 643 (2014). And plaintiffs have identified no personal "Article 32 rights" that SB418 could impair. That should be the end of this case.

Plaintiffs attempt to disguise this fact by referring to the Constitution as "the paramount law" and claiming that it "imposes a deadline" on election officials. The Constitution is, without a doubt, the paramount law. But even if Part II, Article 32 did impose a "deadline," plaintiffs nowhere assert that they

have any "rights" protected by it. In their Complaint, *app'x* at 17, plaintiffs did imagine that Article 32 conferred a constitutional "right" to "obtain timely election results." But their filings, including in this court, have long since abandoned that pretense. *See Enos v. U.S. Bank, N.A.*, 831 F. App'x 289, 290 (9th Cir. 2020) (holding that a lack of a cognizable legal theory is grounds for dismissal). And for good reason: New Hampshire's Constitution does not guarantee any person any right to timely election results.

Even if there were a right to timely election results, plaintiffs have never explained how SB418 interferes with it. At most, SB418 renders one tally during one part of the process overinclusive, including more ballots than it otherwise should. Plaintiffs offer no reason to infer that overinclusive tallies delay the production of election results. Perhaps plaintiffs believe they are entitled to precisely accurate—and not overinclusive—tallies. But they have not said so. Article 32 does not say anything to that effect. And in fact, Article 32 entitles them to nothing. The results are transmitted from the town or ward clerk to the secretary of state--not to the public. In short, Article 32 does not protect any individual right, so there is no right "of theirs" to vindicate in this case.

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The fallacy of plaintiffs' complaint is that is assumes every organizational provision in the Constitution creates personal rights. But that is not so. Much of the document concerns itself not with rights of individuals, but rather with the foundational structure and basic operations of the government. Indeed, the division of the New Hampshire Constitution into two parts, Part First, the Bill of Rights, and Part Second, the Form of Government highlights this. And Part II, Article 32 is quite obviously in the latter.

This is evident by the fact that a suit by a private party to enjoin a town clerk to submit a tardy moderators' declaration would be unthinkable. If anyone has "rights" under Article 32—and it is not clear that anyone does—it could only be the secretary of state. Unsurprisingly, New Hampshire caselaw is entirely devoid of any case enforcing any "rights" under Article 32.

If this Court were to accept plaintiffs' contention that constitutional provisions establishing governmental structures and procedures vested people with a right to sue for enforcement without a showing of any particularized harm to them, it would throw open the courthouse doors to all manner of claimants and simultaneously needlessly handcuff the government. Part Second contains a variety of directions to government officials. For example, Part II, Article 3 provides that "[t]he senate and house shall assemble biennially on the first Wednesday of December for organizational purposes in even number years, and shall assemble annually on the first Wednesday following the first Tuesday in January…." But what if they assemble on the first Thursday instead of the first Wednesday to accommodate some special need or because of some natural disaster like a blizzard? Could citizens or organizations with no personal rights at stake file a DJA action to compel a session of the legislature? Of course not. And that case would be no different than this case. Or consider a statute calling for commission to issue an interim report by a date certain. Would the failure of the commission to submit such a report enable a plaintiff to enjoin submission of a final report? The suggestion is absurd. Yet that is what Plaintiffs here propose.

Finally, it is worth noting that New Hampshire law does acknowledge one doctrine that opens the courthouse doors to plaintiffs that cannot show any harm. That is the doctrine of taxpayer standing, which represents an

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exception to the general rule, and which is enshrined in our Constitution. And even that provision is limited to actions of government that required the expenditure of public funds. Were this Court to allow unharmed plaintiffs to proceed under the DJA, there would be no need for the taxpayer standing. Rather than meeting the demands of that doctrine, taxpayers would simply file suit under the DJA. The constitutional provision would be deprived of all meaning.

B. Even If Plaintiffs Had A Right Protected By Article 32, Nothing In SB418 Conflicts With The Text Of That Provision.

Even beyond the fatal threshold absence of a constitutional right, plaintiffs cannot even plausibly allege that SB418 contravenes Article 32 in any respect. 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 SB418. First, on the day of the meeting Article 32 instructs the moderator to "receive the votes of all inhabitants of such towns and wards present, and qualified to vote," to "count the said votes," and make "a public declaration thereof…" It further directs the town clerk to "make a record of the same." Second, after the day of the election, Article 32 instructs the town clerk to "make out a fair attested copy" of the moderator's declaration, and to direct it "to the secretary of state, within five days following the election…." *Id.*

Even today, with SB418 in effect, moderators across the state count all the ballots, including affidavit ballots cast by persons "qualified" to cast them, and clerks transmit those counts to the Secretary of State within five days, all in complete accord with Article 32. To be sure, the affidavit ballots are

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counted and maintained separately from other ballots, but nothing in Article 32 establishes an anti-segregation principle. There is still a "count of said votes" cast by persons qualified to cast them and a transmission of that count to the Secretary of State.

Plaintiffs offer nothing to explain how a count of all ballots cast could possibly offend Article 32. They suggest that because some affidavit ballots may later be removed from the final tally, the moderators' election night counts are not a tally of the ballots of those qualified to vote. *Pltf's Br.* at 25. They are wrong. Affidavit ballot voters are presumptively qualified to vote. That much is evident from the fact that they are permitted to cast ballots at all. People who are not qualified are turned away at the polls. The only difference between affidavit ballot voters and other voters is not their qualifications but that they must undertake an extra step to confirm their identity before the expiration of seven days.

In any event, plaintiffs cannot explain why the possibility that ballots may later be deemed invalid means the moderators' counts were something other than a tally of ballots cast by those qualified to vote at that time. Plaintiffs do not allege, for example, that SB418 causes moderators to fail to count the ballots of any qualified voters. SB418 does not result in any ballots being uncounted as of the expiration of the five-day period. Thus, even if affidavit ballot voters were not presumptively qualified voters, that would mean only that the moderators' counts might prove overinclusive—including ballots from unqualified voters as well as ballots of qualified voters. Such tallies, therefore, are at all times, even under SB418, inclusive of every vote of every qualified voter, consistent with the Article 32's directive. In short, while

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underinclusive tallies might, under this theory, present a constitutional problem, overinclusive tallies are of no constitutional moment.

If more were needed to dispatch plaintiffs' argument, it is worth noting that it would call into serious constitutional doubt numerous statutes that are necessary for the orderly conduct of elections. For example, removing ballots from the moderator's tally is precisely what happens in recounts. *See* RSA 660:1-6. During a recount, 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 from a moderator's count may be included if they turn out to be valid, and ballots previously included may be excluded if they are invalid. Notably, every aspect of a recount, from the meeting of the ballot law commission to appeals to the Supreme Court occurs well after the five-day period set forth in Article 32. *See, e.g.*, RSA 665:5; 665:16. In short, if recounts are constitutional, and no one contends otherwise, SB418 is as well.

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Plaintiffs' only response is to assert that SB418 violates Article 32 because, in their view, it involves a reassessment of a voters' qualifications, whereas recounts do not. This protest fails for several reasons.

First, plaintiffs are wrong about what SB418 does. SB418 does not result in a post-moderator tally reassessment of any voters' qualifications. That much is clear from its terms, which are addressed to the qualification of the ballot in question and not the qualifications of the person who cast it. That is why, in every location save one, the text of SB418 addresses "unqualified affidavit ballots" and "unqualified votes" not "unqualified voters." *App'x* at 32-33, Sections 1.II, 2.V, 2.VI (second sentence); *but see* Section 2.VI (first sentence). Removing a ballot because an individual failed to corroborate his

qualifications is not a determination that the voter was not, as a factual matter, qualified. Maybe they were, maybe there were not. The point is that they failed to qualify their ballots.

Courts routinely distinguish "voter qualifications" on the one hand, from "the selection and eligibility of candidates" and "the voting process itself" on the other. See, *Burdick v. Takushi,* 504 U.S. 428, 433 (1992) ("Each provision of [an election] code whether it governs the registration and qualifications of voters, the election and eligibility of candidates, or the voting process itself" affects the individual's right to vote). *See also Crawford v. Marion County Election Bd.*, 553 U.S. 181, 193 (2008) (HAVA and NVRA "indicate that Congress believes that photo identification is one effective method of establishing a voter's qualifications," not that providing identification itself is a qualification). *See also, id.* at. 204 (Scalia concurring) (discussing whether a voting law governs voter qualifications, candidate selection, or the voting process). In construing the "materiality provision" of the federal Voting Rights Act, courts have made a similar distinction between rules governing the mechanics of ballot casting or ballot preparation from a person's status as a qualified voter. *Pennsylvania State Conf. of NAACP Branches v. Sec'y Commonwealth of Pennsylvania,* 97 F.4th 120, 135 (3d Cir. 2024)("vote casting rules like the [absentee ballot] date requirement have nothing to do with determining who may vote"); *Liebert v. Millis*, No. 23-CV-672-JDP, 2024 WL 2078216, at *13 (W.D. Wis. May 9, 2024). Reading SB418 as a whole, it is clear from the context and structure of the statute that the legislature did not intend to change the fundamental qualifications of who may vote in a New Hampshire election. Rather, SB418 seeks to ensure that an election day registrant is actually qualified, rather than adding to those qualifications.

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Second, plaintiffs are just wrong about recounts. Nothing in New Hampshire law precludes a ballot challenge on the ground that the voter who cast it was unqualified. In fact, the permissible grounds for protest under RSA 660:5 are not specified and thus unlimited. And while ballot-anonymity protections may make voter-qualification-based challenges difficult, they do not render them impossible. For example, a non-citizen or a minor may confess to having cast an illegal ballot that is readily identifiable by various markings or by through discovery of a voter's "ballot selfie." *See Rideout v. Gardner,* 838 F.3d 65 (1st Cir. 2016). Plaintiffs cannot—and do not—seriously contend that Article 32 precludes a protest to such a ballot under RSA 660:5.

Finally, even if plaintiffs were right about SB418 and New Hampshire's recount rules, their argument still would fail. If a candidate successfully challenges the "counting of…any ballot" on grounds other than voter qualification, that ballot is excluded from the tally. That ballot might have been cast by a qualified voter or an unqualified voter, like a minor or a non-citizen. If the excluded ballot came from an unqualified voter, the moderator's tally will have been overinclusive in exactly the same way as it might be as a result of an exclusion under SB418. That is, the ballot of an unqualified voter will have been included in the "five-day tally" and excluded from the final count. In neither case does the exclusion of that ballot somehow violate Article 32.

C. Plaintiffs Misconstrue The Standard Of Review Applicable To Facial Challenges.

Plaintiffs have brought a facial challenge to SB418, which "is, of course, the most difficult challenge to count successfully." *State v. Furgal*, 161 N.H. 206, 210 (2010). To analyze a facial challenge, the Court must "first

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determine how the statute is to be construed and then whether that construction can withstand a facial challenge." *Id.* Regardless of which facial challenge test the Court applies here, SB418 withstands its review.

Plaintiffs argue that the test described in *New Hampshire Democratic Party v. Sec'y of State,* 173 N.H. 312 (2021) ("*NHDP*"), is the applicable test. According to plaintiffs, that test requires the Court to review the statutory language to determine whether it is in clear and substantial conflict with the relevant constitutional test. Notably, plaintiffs do not identify the constitutional test relevant to a challenge based on Article 32, likely because that provision is not intended to protect constitutional rights, as are other constitutional provisions. *Cf. Guare*, 167 N.H. at 667 (applying "flexible standard" adopted in *Akins v. Sec'y of State*, 154 N.H. 67 (2006), to Part I, Article 11 challenge). Here, there is no test to determine whether a constitutional right is violated, and plaintiffs suggest none. Instead, they simply invent what they assert is an absolute right to a five-day tally that is to their benefit. For the reasons set forth above, they do not benefit from any such right and SB418 harms no interest related to Article 32 anyway.

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The Court should revisit *NHDP* and either limit its applicability or abandon it altogether.[1] Whatever the merits of that test for cases that involve individual rights, where courts must weigh the burdens imposed on the citizens of this state against the state interests at issue, it is wholly inappropriate for a case like this in which plaintiffs seek to invalidate an entire statutory scheme on the ground the one aspect of it ever so slightly

[1] *NHDP* was premised on the federal court decision in *Saucedo v. Gardner,* 335 F.Supp.3d 202 (D.N.H. 2018). That case, in turn, asserted that *United States v. Salerno,* 481 U.S. 739 (1987), had not been recently cited and was limited to First Amendment cases. Recent United States Supreme Court decisions indicate that conclusion was premature. *See, United States v. Rahimi,* 144 S.Ct. 1889 (2024); *Borden v. United States,* 593 U.S. 420 (2021).

transgresses, in their view, a concrete constitutional limitation. On this view, a cure period of five days and one hour would invalidate the entire system of voter photo identification for same-day registrants. That cannot be the law, as it would subject an untold number of comprehensive legislative proposals to constitutional peril. Any plaintiff who could identify any corner of a law that slipped over a constitutional boundary could secure the statute's complete invalidation. That invalidation would not be limited to the offending provision, nor would it be limited to the specific plaintiff in that specific case. The entire law, including its constitutional applications, would be excised from the statute books as applied to every person in the state.

In any event, if there is, in the language of *NHDP*, a "relevant constitutional test" to be applied to evaluate SB418 against Article 32, it can only exist with respect to the cure period offered on days 6 and 7. There is no conceivable constitutional test the court could apply to days 1 through 5, as Article 32 has no applicability to those days whatsoever.

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D. The "Five-Day" Language In Part II, Article 32 Was Not Properly Adopted And Cannot Be The Source Of Any Claimed Right.

Even if the Court finds that Article 32 creates rights that inure to the benefit of the plaintiffs, and even if it finds that the text of SB418 is incompatible with it, plaintiffs are still not entitled to relief because the "five-day" instruction in Article 32 was not properly ratified by the people of New Hampshire.

When the validity of an amendment to the Constitution is attacked after its ratification by the people, "every reasonable presumption, of both law and fact, is to be indulged in favor of the validity of the amendment." *Fischer v.*

Governor, 145 N.H. 28, 37 (2000). This Court "should not declare unconstitutional the voters' ratification of the amendment at issue absent inescapable grounds." *Id.* But where the question submitted to the electorate does not give "the ordinary person a clear idea of what he [or she] is voting for or against," the ratification vote cannot stand. *Id.* While the legal standard appears to be a high one, this Court has previously found inescapable grounds to conclude that a proposed amendment appearing on the same ballot questionnaire that resulted in Article 32's "five-day" instruction was not properly adopted. *See Fischer, id.* It should do so here, as well.

When the Constitutional Convention of 1974 convened, the relevant portion of Article 32 read:

> And the said town or city clerk shall cause such attested copy to be delivered to the sheriff of the county in which such town or ward shall lie, thirty days at least before the said first Wednesday of January or to the secretary of state at least twenty days before the said first Wednesday of January.

As this text clearly reflects, Article 32's instructions to town officials required delivery of the election results to the sheriff rather than to the secretary of state and the time for delivery was far more than five days.

The constitutional convention adopted the currently published language and authorized it to be put before the people for ratification in the 1976 general election. *Convention to Revise the Constitution,* 177 (1974). The journal of the convention reflects that the intended scope of the Article 32 amendment as: "(3) requiring that the secretary of state receive and count votes and notify winners of biennial elections." *Id.* Missing from this description is any notion of shortening the time period for election results to be transmitted.

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Consistent with the convention's resolution, the people were asked to ratify an amendment to the Constitution in the 1976 election on a ballot questionnaire that read, in relevant part:

> 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 *Manual for the General Court* 687-688 (1977). Again, there was no mention of shortening the time for transmitting the post-election tallies. The voters approved the measure as presented on the ballot questionnaire. *Id.* But the people never voted on any measure that informed them that they were being asked to ratify the "five-day" language. Accordingly, their ratification of that measure was ineffective.

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That is the lesson of *Fischer*. In *Fischer* this Court held invalid the popular ratification of an amendment proposed by the *same* Constitutional Convention of 1976 and considered by the voters on the *same* ballot questionnaire that approved the "five-day" amendment to Article 32. The Court compared the language adopted by the convention to the language presented to the voters and found that the "ballot questionnaire submitted to the citizens for ratification failed to alert the voters to any substantive change…" and concluded therefore, that the Constitution "was not properly amended…." *Id.* at 38. As a consequence of this legally defective process, the Court turned to the text of the last properly adopted amendment to Article 11 and applied it to the question before it.

The same failure identified in *Fischer* affects Article 32's "within five days following the election" language. As in *Fischer*, the amendment to Article 32 was drafted by the Constitutional Convention of 1974. And just as in *Fischer*, the language presented to the people in the ballot questionnaire for ratification did not put them on notice that it would impose a time limit on local election officials to determine the winner of the contest. Based on the language of the ballot questionnaire, the people could reasonably have understood only that they were vesting that responsibility to receive ballots from the towns in the secretary of state. As in *Fischer,* there are "inescapable grounds" that the ballot question failed to "give the ordinary person a clear idea of what he [or she] is voting for or against." *Fischer,* 145 N.H. at 37 (quotations omitted). It gave no hint to the voters that it might be interpreted to limit the legislature's authority to allow generous periods for would-be voters to cure their failure to arrive at the polling place with required documentation. To put it another way, nothing in the ratification history indicated to voters that they were restricting the authority of the legislature to *ease* any burdens that might be imposed by valid election integrity safeguards like voter photographic ID requirements. And it certainly provided no hint that it created a private right of action to have such a limit enforced by a court.

As in *Fischer,* when a question arises under the relevant article, the Court must construe language that was properly adopted by the people. Construing the proper language, there is no conflict whatsoever between Article 32 and SB418. The operative language in Article 32 requires the city or town clerk to deliver the relevant election results to the sheriff at least thirty days before the first Wednesday in January, or to the secretary of state at least

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twenty days before that same date. None of those dates are remotely implicated by SB418's seven-day provision.

As in *Fischer,* plaintiffs here ask the Court to declare an act of the legislature unconstitutional in reliance upon a provision that was not properly adopted. Unlike *Fischer,* however, the Court here can avoid this question by resolving this case against plaintiffs on the grounds identified above, including that the DJA is not an appropriate vehicle and that SB418 does not transgress any version of Article 32. This Court has a "long-standing policy not to decide questions of a constitutional nature unless absolutely necessary to a decision of the case." *State v. Barrocales*, 141 N.H. 262, 264 (1996) (quoting *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring) (quotation omitted). Here, the Court can decide the case based on textual interpretation and the application or ordinary rules of construction discussed, *supra.*

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E. The Trial Court Correctly Denied Plaintiffs' Request For An Injunction.

"The issuance of injunctions, either temporary or permanent, has long been considered an extraordinary remedy." *ATV Watch v. N.H. Dep't of Resources and Econ. Dev.*, 155 N.H. 434, 437 (2007) (quotation omitted)). "An injunction should not issue unless there is an immediate danger of irreparable harm to the party seeking injunctive relief,…there is no adequate remedy at law… [and the] party seeking an injunction [is] likely [to] succeed on the merits." *Id.*

"It is within the trial court's sound discretion to grant an injunction after consideration of the facts and established principles of equity." *Dep't of Envtl. Servs. v. Mottolo*, 155 N.H. 57, 63 (2007). This Court will "uphold the trial

court's factual findings unless the evidence does not support them or they are erroneous as a matter of law." *Rabbia v. Rocha*, 162 N.H. 734, 738 (2011). And it "will uphold the issuance of an injunction absent an error of law, an unsustainable exercise of discretion, or clearly erroneous findings of fact." *Frost v. Comm'r, N.H. Banking Dep't*, 163 N.H. 365, 374 (2012).

1. This Court Should Affirm The Trial Court's Denial Of Injunctive Relief.

The harms Plaintiffs' claim to suffer due to SB418's enforcement have no support in the factual record, are rank speculation, and bear zero relation to the alleged violation of Article 32 that is the subject of this appeal. Plaintiffs contend that SB418 "will result in disenfranchisement," that voters "may decide it is not worth the trouble to attempt to vote," and that voters "may have their votes thrown out for failure to successfully complete the affidavit-ballot-qualification process on time." *Pltf's Br.* at 33. This is all *ipse dixit* and not the stuff on which extraordinary remedies like preliminary injunctions should be awarded. Further, whether any of this will come to pass has nothing at all to do with whether enforcement of SB418, in full, violates Article 32. To the contrary, shortening the cure period to bring SB418 into "compliance" with Article 32 could not possibly redress these harms, to the extent they could even be substantiated.

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Plaintiffs allege only two injuries that can reasonably be understood to arise from their Article 32 claim: (1) that SB418 "deprives voters and candidates of the timely vote tally that article 32 guarantees"; and (2) that "plaintiffs and their affiliated candidates must invest organizational resources

to educate voters and protect threatened rights [and must] prepare for delayed vote counts and contests over which affidavit ballots count…." *Pltf's Br.* at 34.

All of this is makeweight. Plaintiffs are not entitled to injunctive relief for the harms they have alleged arise from Article 32 for three independent reasons, any one of which causes their appeal to fail. *First,* for reasons set forth above, they are unlikely to succeed on the merits with their claim that Article 32 instills rights that they may enforce. *Second*, they have not alleged that SB418's alleged conflict with Article 32 harms *them* in any way. In fact, they have not identified any mechanism by which a violation of Article 32 inflicts any harm on anybody at all. *Third*, they cannot meet their burden under the applicable standard of review, which requires them to establish that the trial court's findings were contrary to the evidence in the record because there are no findings of fact that relate to their Article 32 claim.

Plaintiffs are unable to establish that there is an immediate danger of harm. Plaintiffs themselves do not vote and therefore they cannot register to vote and be subject to SB418's procedures. As discussed *supra,* Article 32 creates no right that vests in them, and therefore they cannot be harmed by a violation of it. Likewise, SB418 has no effect on plaintiffs' "voting members and candidates" because SB418 concerns voter registration for first-time registrants and all of plaintiffs' members and candidates are already registered voters. Under New Hampshire law, the party affiliation of plaintiffs' members is directly connected to registering to vote and is supervised and maintained by election officials. *See,* RSA 654:7 (requiring voter registration form to include field for party affiliation); RSA 654:15 (adding part member of the voter, if any, to checklist); RSA 654:32 (hearings before supervisors of checklist concerning alterations to party registration); RSA 654:34 (change of party

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registration); RSA 654:34-a (permitting changes in party affiliation to be registered with town or city clerk); RSA 654:35 (correction of checklist showing registration of party members); RSA 654:38 (verification of checklist, including party designation). Because of this, the members of the plaintiff organizations are already registered to vote and, therefore, ineligible to cast an affidavit ballot. Conversely, a person who is unregistered to vote cannot be one of the plaintiffs' members.

Plaintiffs' candidates are tied even more tightly to voter registration than are its members. In order to run for office in plaintiffs' primary, the candidate must sign a declaration of candidacy and must be a registered voter domiciled in the relevant district and a registered member of plaintiffs' party. *See* RSA 655:17, II. This makes it legally impossible for any of plaintiffs' candidates to be subject to SB418.

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Plaintiffs suggest that someone who is subject to SB418 is likely to become one of their members. But this is circular. A person can become a member of a political party in New Hampshire only upon registration, and a person allegedly harmed by SB418 has not yet completed their registration. In any event, it is speculation on top of guesswork on top of conjecture. There is no reason to simply assume that some affidavit ballot voters will also join their party. New Hampshire law is clear that that a "mere possibility or fear that injury will occur is insufficient to justify granting equitable relief," *Meredith Hardware, Inc. v. Belknap Realty Trus*t, 117 N.H. 22, 26 (1977), and "theoretical injury…does not furnish ground for interposition by injunction." *Johnson v. Shaw*, 101 N.H. 182, 188–89 (1957) (quotation omitted).

Beyond all of this, there is the inconvenient fact that plaintiffs cannot link any violation of Article 32 to any harm at all. Plaintiffs say that

enforcement of SB418 delays the tallies to which their voters and candidates are entitled in a timely manner. Not so. SB418 does not interfere at all with the transmission of those tallies within five days. At most it renders them overinclusive. Such tallies may lack precision, but they are not untimely. In any event, nothing in Article 32 entitles plaintiffs' members or candidates to anything. Under Article 32, the tallies at issue are communicated to the Secretary, not to voters or candidates. As a result, the internal transmission of the tallies from one government actor to another cannot harm voters or candidates, even if those transmissions are defective in some way, whether because they are tardy or imprecise.

Next, plaintiffs claim that they suffer irreparable harm from spending money to "educate voters," "protect threatened rights," and "prepare for delayed vote counts and contests over which affidavit ballots count." Frankly, these assertions are ridiculous. And none is linked in any way to any violation of Article 32.

First, plaintiffs do not explain how any alleged violation of Article 32 results in any need to educate voters. What do voters, as voters, need to know about whether the moderators' five-day tallies comply with whatever dictates Article 32 may impose upon them? Quite obviously, nothing. Plaintiffs have not explained any need to educate voters about the government's internal procedures for counting ballots, transmitting tallies, and certifying results. And no such need exists. Internal procedures of this sort have no bearing on voter conduct whatsoever.

To be sure, plaintiffs may wish to educate voters who intend to register on election day that they need to arrive at the polls with acceptable identification or be prepared to supply such identification within seven days

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thereafter. But that desire is wholly independent of whether the cure period is a lenient seven days, and unconstitutional in plaintiffs' view, or a more restrictive five days, and thus constitutional. Any spending on education is thus wholly unrelated to any constitutional violation.

Second, plaintiffs do not explain how they will spend money to "protect threatened rights," mainly because there is no such thing as Article 32 rights that could be threatened. These are just words, signifying nothing.

Third, plaintiffs have pointed to nothing in the record that suggests SB418, let alone any alleged violation of Article 32, will delay vote counts. Recall, SB418 does not delay transmission of the moderators' tallies. And there is nothing in the record that suggests that adjudication of affidavit ballots after transmission of the moderators' tallies delays final certification by even a minute. And there is no evidence that shortening the cure period to five days would avoid any such delay. In other words, no delay is caused by any violation of Article 32. On top of this, plaintiffs do not explain how any delay in election results might harm them. If there is a delay, what do plaintiffs need to do other than wait?

The same goes for plaintiffs' contention that SB418 requires them to expend resources to prepare for contests over which affidavit ballots will count. Even if SB418 does cause plaintiffs to expend resources, it is not because of any violation of Article 32. It would be because affidavit ballots, regardless of the length of the cure period afforded, must be adjudicated at some point. The same preparation would be needed if the cure period were five days rather than seven. Article 32 is irrelevant to any such harm.

Finally, it is worth noting just how flimsy these allegations of harm really are. The United States Supreme Court recently held that such claims are

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insufficient to support standing, let alone the extraordinary remedy of a preliminary injunction. *See, Food and Drug Administration v. Alliance for Hippocratic Medicine,* 602 U.S. 367, 394 (2024) (denying standing on diversion of resources theory of injury and noting plaintiffs cannot "spend their way" into standing). And plaintiffs have identified no New Hampshire law that permits a finding of harm sufficient to grant an injunction based on the thin gruel of the diversion of resources in response to changes in the law.

Further, the only injury alleged is that plaintiffs have been compelled to change their educational materials and training to stay up to date. In other words, that they must do what any organization must do to respond to the passage of time. Organizations update their materials all the time, and there is no allegation in the record that they would not have updated their materials but for SB418. SB418 might have altered the content of those updates, but the allegations are insufficient to establish that SB418 added any material costs to updates that would have occurred in the normal course. Moreover, the need for organizations to alter their materials is the type of response that would attend to *any and every* legislative action.

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Plaintiffs can claim no right to unchanging state laws. In our modern society, there are groups with vested interests in nearly every aspect of New Hampshire law. They produce materials to educate their constituents, whether they are commercial or non-commercial in nature. Nor do the allegations even hint at "from what" the resources are allegedly being diverted. If plaintiffs were going to devote some resources to promoting their candidates through one form of advocacy, but are now planning to use the same amount of funds to promote their candidates through another form, no resources will have been diverted from candidate promotion activities. *See Texas State LULAC v.*

Elfant, 52 F.4th 2428, 253 (5th Cir. 2022) (noting that just to establish standing under diversion of resources theory "specific projects" must be identified that were put on hold or otherwise curtailed).

2. Plaintiffs Cannot Meet Their Burden For Issuance Of And Injunction Nor Standard Of Review On Appeal.

Plaintiffs argue that the trial court found that sufficient facts were alleged for them to have standing. Regardless, it did not make findings of fact that irreparable harm would result sufficient to warrant the issuance of an injunction. The suggestion in plaintiffs' brief that there is some inconsistency at work is misplaced. *See, Pltf's Br.* at 32. Simply stated, the deferential standard applicable to review of a motion to dismiss for lack of standing, which assumes the truth of all well-pled facts, is materially different from the standard applicable to the issuance of an injunction, which requires actual factual findings. If plaintiffs were correct that factual allegations sufficient to establish standing met the standard for issuance of an injunction, then no injunction request would ever be denied, at least not on factual grounds.

Regardless, this Court will uphold the decision of the trial court with respect to issuance of an injunction "absent an error of law, an unsustainable exercise of discretion, or clearly erroneous findings of fact." *Town of Atkinson v. Malborn Realty Trust*, 164 N.H. 62, 66 (2012). Plaintiffs can show none of these things. As set forth *supra,* the trial court's dismissal of Claim I should be affirmed, meaning it had no discretion to issue an injunction. And the trial court's findings of fact cannot be clearly erroneous because it made no findings of fact as to the Article 32 claim. Notably, the trial court gave plaintiffs the opportunity to develop facts on an expedited basis in support of their procedural due process claim. *See App*. 58 ("The parties are directed to

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develop an expedited discovery schedule for further development of the record and submit it to the Court by April 22, 2024"). Rather than take the trial court up on its offer to develop a factual record, plaintiffs chose to nonsuit their procedural due process claim and appeal the dismissal of their Article 32 claim. As a result, the trial court never made the findings of fact that are necessary to support an injunction or to meet the standard of review on appeal.

Even if the Court was to conclude that plaintiffs had articulated valid theories of harm, they would still have had to introduce evidence that those harms are, in fact, real. They did not do so. Accordingly, the trial court could not have made any clearly erroneous finding of fact. "[W]ithout a sufficient record of the proceedings below, [this Court will] assume that the evidence supports the result reached by the trial court…." *Mottolo*, 155 N.H. at 63. For example, plaintiffs argue that they suffer harm entitling them to an injunction because they must "prepare for delayed vote counts and contests over which affidavit ballots count…." *Plf's Br.* at 34. But they introduced no evidence to substantiate that assertion, so the trial court made no findings of fact regarding its validity. Further, defendants and intervenors had no opportunity to challenge plaintiffs' assertions because plaintiffs declined to engage in the opportunity for discovery offered by the trial court. Given the complete absence in the record of any fact-finding on the Article 32 claim, plaintiffs are unable to meet their burden of establishing that the trial court's implicit rejection of this factual claim was unsupported.

Finally, even if this Court was inclined to find that plaintiffs have a valid legal claim and that the trial court's dismissal of their Article 32 claim was improper, it should still deny them their requested relief. Plaintiffs ask this

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Court to reverse the dismissal of their Article 32 claim and remand to the trial court "with instructions to issue a preliminary injunction." *Pltf's Br.* at 39. But Plaintiffs make no attempt to identify any circumstance in which this Court has reversed the dismissal of a claim that was made prior to any fact-finding in the trial court and then remanded to the trial court with orders to grant an injunction. Doing so would fly in the face of the plaintiffs' burden of proof in the trial court, and the rule that acts of the legislature are presumed constitutional and will not be declared unconstitutional "except upon inescapable grounds." *Baines,* 152 N.H. at 133. The request for a directive to issue an injunction is wholly improper.

F. Even If The Court Finds A Constitutional Violation, It Should Sever The Unconstitutionality And Leave The Remaining Provisions Of The Statute In Place.

If the Court finds that Article 32 imposes an absolute five-day restriction on the period the legislature can allow same-day registrants to submit required documentation, the remedy imposed by the Court should sever the unconstitutional portion and leave the remainder intact. When "confronting a constitutional flaw in a statute, [courts] try to limit the solution to the problem by disregarding the problematic portions while leaving the remainder intact." *United States v. Athrex, Inc.*, 594 U.S. 1, 23 (2021) (citation omitted). "In determining whether the valid provisions of a statute are severable from the invalid ones, [the Court] is to presume that the legislature intended that the invalid part shall not produce entire invalidity if the valid part may reasonably be saved." *Associated Press v. State,* 153 N.H. 120, 141 (2005). The Court must also determine "whether the unconstitutional provisions of the state are so integral and essential in the general structure of

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the act that they may not be rejected without the result of an entire collapse and destruction of the statute." *Id.* (quotation omitted).

The Court's determination on severability is informed by three interrelated principles. First, courts "try not to nullify more of a legislature's work than is necessary, [as courts know] that a ruling of unconstitutionality frustrates the intent of the elected representatives of the people." *Ayotte v. Planned Parenthood of New England*, 546 U.S. 320, 329 (2006) (quotation omitted). The "normal rule" is that "partial, rather than facial, invalidation is the required course, such that a statute may…be declared invalid to the extent that it reaches too far, but otherwise left intact." *Id.* Second, the Court must remain mindful that its "constitutional mandate and institutional competence are limited" and must restrain itself from "rewrite[ing] state law to conform it to constitutional requirements even as [it] strives to salvage it." *Id.* (quotation omitted). Third, the touchstone for any decision about a remedy is legislative intent, for a court "cannot use its remedial powers to circumvent the intent of the legislature." *Id.* (quotation omitted). In other words, "[a]fter finding an application or portion of a statute unconstitutional, [a court] must next ask: Would the legislature have preferred what is left of its statute to no statute at all." *Id.* (quotation omitted).

SB418's allowance of seven days for a same-day registrant to provide proper identification is uniquely severable from the rest of the statute. After all, the plaintiffs' entire argument is that the seven-day cure period permitted by SB418 conflicts with the more restrictive five-day period established by Article 32. The seven-day cure period is discreet, unintegrated, and independent of the rest of the bill. The presumption of severability should stand for three reasons. First, the structure of the act does not turn on the

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seven day cure period. It could be increased or decreased without impacting the operation of the law at all. Moreover, severing the cure period does not require the court to rewrite the statute. Plaintiffs argue Article 32 sets the cure period at five days. That policy choice has, according to them, already been made and written into our paramount law.

Further, it can hardly be doubted that the legislature would have preferred a statute with a five-day cure period to no statute at all. There simply is no evidence to support a contrary conclusion. The purpose statement expresses that the legislature's intent was to protect the integrity of elections through photo identification for same-day registrants. Had the legislature been advised that the Constitution prevented it from providing a cure period of more than five days, it would still have enacted the election integrity provisions. In short, there is no reason to conclude that the legislature's belief that a seven-day cure period was permissible was in any way meaningful to its decision to move forward with identification requirements for same-day registrants. The legislative record establishes that the focus was on protecting the integrity of the same-day registration process, not on accommodating people who both did not avail themselves of opportunities to register before election day *and* arrive at the polling place without required documentation. *App'x* at 32.

Simply put, the presumptions in favor of severability are all present here, while none of the concerns about its application are.

V. Conclusion

For the foregoing reasons, the decision of the trial court to dismiss plaintiffs' Article 32 claim should be affirmed. In the alternative, plaintiffs' appeal of the denial of their injunction should be denied.

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Oral argument requested (15 minutes)

Respectfully Submitted
REPUBLICAN NATIONAL
COMMITTEE

And

NEW HAMPSHIRE REPUBLICAN
STATE COMMITTEE

By their attorneys,
Lehmann Major List, PLLC

/s/Richard J. Lehmann

July 26, 2024 ______________________________

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CERTIFICATE OF COMPLIANCE

I hereby certify that pursuant to Rule 16(11) of the New Hampshire Supreme Court Rules, this brief contains approximately 9329 words, exclusive of pages containing the table of contents, table of citations, an other such matters. Counsel relied upon the word count of the computer program used to prepare this brief.

/s/Richard J. Lehmann

July 26, 2024 ________________________________

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.

/s/Richard J. Lehmann

July 26, 2024 ________________________________

Richard J. Lehmann

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DECISION BEING APPEALED OR REVIEWED

April 16, 2024 Notice of Decision and Order from the
Merrimack Superior Court……………………………..………………41

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THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS. **SUPERIOR COURT**

Democratic National Committee, et al.

v.

David M. Scanlan,
New Hampshire Secretary of State, et al.

Docket No.: 226-2023-CV-00613

ORDER ON MOTIONS TO DISMISS AND PRELIMINARY INJUNCTION

The plaintiffs, the Democratic National Committee ("DNC") and the New Hampshire Democratic Party ("NHDP"), bring this action against David M. Scanlan and John M. Formella, in their official capacities as New Hampshire Secretary of State and Attorney General, respectively, (together the "State") seeking a preliminary injunction and further declaratory and injunctive relief related to SB 418, an election law providing for affidavit ballot voting. (Court index ##1–3.) The Republican National Committee ("RNC") and the New Hampshire Republican State Committee ("NHRSC") intervened in the action. (Court index #13.) The State and intervenors move to dismiss. (Court index ##15, 17.) The plaintiffs object, to which the State and intervenors reply. (Court index ##20, 21, 26, 29.) On March 12, 2024, the Court held a hearing on the motions to dismiss and motion for preliminary injunction. For the reasons stated below, the State's and intervenors' motions to dismiss are GRANTED with respect to Count I of the complaint and DENIED with respect to Count II, and the plaintiffs' motion for preliminary injunction is DENIED.

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Factual Background

The Court recounts the following facts in accordance with the legal standard.

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Merrimack Superior Court
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On June 17, 2022, the New Hampshire legislature enacted SB 418. (Compl. ¶ 2.) On January 1, 2023, SB 418 went into effect. Laws 2022, ch. 239. In the findings portion of SB 418, the New Hampshire legislature recognized that in the last 45 years, 44 state elections had been decided in a tie or by one vote, and in the 2016 general election at least 10 illegal ballots were cast and the identity of 230 voters could not be verified. (Compl., Ex. A.) Thus, through SB 418, the legislature sought to prevent unverified votes from counting in New Hampshire elections. (Compl., Ex. A) ("Allowing unverified votes to count in an election enables the corruption of New Hampshire's electoral process. This must be addressed immediately to restore the integrity of New Hampshire elections.") Mechanically, SB 418 amended RSA 659 and RSA 660 by adding new sections RSA 659:23-a and RSA 660:17-a, and by amending RSA 659:13, I(c). (See id.) These changes codified the new affidavit ballot voting procedure within SB 418.

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Affidavit Ballot Voting under SB 418

The affidavit ballot voting procedure within SB 418 applies to any first-time New Hampshire voter who registers on election day but lacks a valid photo identification, or otherwise fails to meet the statutory identification requirements of RSA 659:13. RSA 659:23-a, I. In those instances, an election official will hand the voter an affidavit voter package and explain its use. RSA 659:23-a, II. The affidavit voter package contains a prepaid envelope addressed to the Secretary of State and an affidavit voter verification letter listing any documents the voter must provide to verify their identity. RSA 659:23-a, II (a), (b).

After a voter casts an affidavit ballot, local election officials mark the ballot with a unique affidavit ballot number, place it in a container designated "Affidavit Ballots," and hand count the number of affidavit ballots. RSA 659:23-a, IV. "After completion of counting, the moderator shall note and announce the total number of votes cast for each candidate, and the total number of affidavit ballots cast in the election." Id. "No later than one day after the election, the moderator shall forward all affidavit ballot verification letters to the secretary of state . . . ." Id.

The affidavit ballot voter must return the verification letter and any necessary documents to verify their identity to the Secretary of State within seven days. RSA 659:23-a, II (b). "On the seventh day after the election, if an affidavit ballot voter has failed to return the verification letter with the missing voter qualifying documentation . . . the secretary of state shall instruct the moderator . . . to retrieve the associated numbered affidavit ballot and list . . . the votes cast on that ballot." RSA 659:23-a, V. "The votes cast on such unqualified affidavit ballots shall be deducted from the vote total for each affected candidate or each affected issue." Id.

Within 14 days of the election, the city, town, ward, or district must provide the Secretary of State with a summary report of the total votes cast by unqualified voters. RSA 659:23-a, VI. "The total vote minus the unqualified affidavit ballot vote for each race or issue shall be the final vote to be certified by the appropriate certifying authority." Id. The names of the affidavit ballot voters who fail to satisfy the identity verification process are referred to the Secretary of State for investigation. RSA 659:23-a, VII. SB 418 does not require notice to voters whose votes are determined to be unqualified or whose name is referred for investigation. (Compl. ¶ 34.)

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The Plaintiffs

The DNC is a national committee whose "organizational purposes and functions are to communicate the Democratic Party's position and messages on issues; protect voters' rights; and aid and encourage the election of Democratic candidates at the national, state, and local levels . . ." (Id. ¶¶ 8–9.) The DNC not only persuades and organizes citizens "to register to vote as Democrats but also to cast their ballots for Democratic nominees and candidates." (Id. ¶ 9.) The DNC operates in every U.S. state, territory, and the District of Columbia. (Id. ¶ 10.)

The NHDP is a state committee whose purpose is to "elect candidates of the Democratic Party to public office throughout New Hampshire." (Id. ¶ 11.) NHDP supports democratic candidates and protects voters' rights through fundraising and organizing efforts. (Id.) NHDP has many members who vote for or otherwise support democratic candidates, including those who will register on election day. (Id. ¶ 12.) NHDP has over 264,000 registered members. (Id. ¶ 13.)

Relevant Voting Facts and Alleged Effect on Elections

According to the plaintiffs, in the New Hampshire general election in 2020, 75,612 voters registered on election day, representing nearly 10% of the electorate.[1] (Id.) In that election, the plaintiffs allege that the "precincts with the highest number of election-day registrations tended to be areas with the highest number of young, non-white, and/or low-income voters," and that those precincts "also voted overwhelmingly for Democratic candidates." (Id. ¶ 25.) Despite the fact that SB 418's affidavit ballot

[1] If SB 418 has been in place in 2020, only a percentage of those voters would have been required to vote by affidavit ballot, as first-time voters who provide satisfactory identification would cast their ballots without further requirements.

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procedure has been in effect during several elections, including the 2024 presidential primary, the plaintiffs have not named a member of either organization whose right to vote, or right to be elected, has been violated.

The plaintiffs allege that because SB 418 changes the way that some voters, including those who tend to vote for Democratic candidates, will cast their ballots, the DNC and NHDP "will have to engage in a broad-based education program targeting thousands of New Hampshire Democratic voters as well as Democratic candidates." (Id. ¶ 14.) The plaintiffs allege that such an informational campaign would likely include revising and distributing educational and advertising information by mail and online, hiring additional staff, training volunteers, and extending staff payroll by an additional week to support post-election work. (Id.) The plaintiffs allege SB 418 will likely "cost at least tens of thousands of dollars and hundreds, if not thousands, of hours of work by DNC and NHDP employees," and will divert resources from other activities essential to their core purpose, including get-out-the-vote and voter registration initiatives. (Id.)

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Analysis

The plaintiffs petition this Court for declaratory and injunctive relief, and move for preliminary injunction, on the basis that SB 418 facially violates Part I, Article 15 and Part II, Article 32 of the New Hampshire Constitution. The State and intervenors object and move to dismiss, contending that the plaintiffs lack standing to bring their claims and, alternatively, that SB 418 is not facially unconstitutional. The Court first addresses the motions to dismiss, then addresses the plaintiffs' motion for preliminary injunction.

Motions to Dismiss

"Generally, in ruling upon a motion to dismiss, the trial court is required to determine whether the allegations contained in the petitioners' pleadings are sufficient to state a basis upon which relief may be granted." Avery v. N.H. Dep't of Educ., 162 N.H. 604, 606 (2011). The Court assumes all well-pleaded facts in the complaint to be true and construes all reasonable inferences in the light most favorable to the plaintiff. Weare Bible Baptist Church, Inc. v. Fuller, 172 N.H. 721, 725 (2019). The Court then engages in a threshold inquiry that tests the facts alleged by the plaintiff against the applicable law, and if the allegations constitute a legal basis for relief, must deny the motion to dismiss. Pro Done, Inc. v. Basham, 172 N.H. 138, 141-42 (2019). "In conducting this inquiry, [the court] may also consider documents attached to the plaintiffs' pleadings, documents the authenticity of which are not disputed by the parties, official public records, or documents sufficiently referred to in the complaint." Boyle, 172 N.H. at 553 (quoting Ojo v. Lorenzo, 164 N.H. 717, 721 (2013)).

I. Standing

However, "[w]hen the motion to dismiss . . . raises certain defenses, the trial court must look beyond the [plaintiffs'] unsubstantiated allegations and determine, based on the facts, whether the [plaintiffs] ha[ve] sufficiently demonstrated [their] right to claim relief." Avery, 162 N.H. at 606. (quotation omitted). "A jurisdictional challenge based upon lack of standing is such a defense." Id. at 607.

The State argues that the plaintiffs lack standing to petition for declaratory judgment for four reasons: (1) the plaintiffs are not persons eligible to vote in New Hampshire; (2) the plaintiffs have not identified any member who has been required to vote by affidavit ballot; (3) the plaintiffs have not identified any member who was

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deterred from voting due to SB 418; and (4) the plaintiffs have not identified any member whose vote was unqualified, and therefore deducted, under SB 418. (Court index #15 ¶¶ 20–22.) Further, to the extent the plaintiffs claim they have standing under a diversion of resources theory, the State argues the plaintiffs have not alleged that they have spent any money on, or taken any steps towards, carrying out a broad-based voter education program. (Id. ¶ 23.)

The plaintiffs argue they have organizational standing because SB 418 undermines their primary purpose of maximizing the number of votes for Democratic candidates and would require plaintiffs to expend significant financial and human resources to educate voters on the law. (Court index #22 at 10–14.) The plaintiffs further contend that they have organizational standing as the representatives of their members, including potential voters and political candidates who have constitutional rights to vote and be elected under Part I, Article 11. (Id.)

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The United States Supreme Court has found that political parties have standing to contest election laws under Article III of the United States Constitution. Crawford v. Marion Cnty. Election Bd., 553 U.S. 181, 189 n.7 (2008) (stating that the court agreed with the "unanimous view" of the District Court and Court of Appeals that the Indiana Democratic Party had standing to challenge an Indiana election law requiring in-person voters to present photo identification). More generally, the court has recognized organizational standing in two forms. Students for Fair Admissions, Inc. v. President and Fellows of Harvard Coll., 600 U.S. 181, 199 (2023). "Either the organization can claim that it suffered an injury in its own right or, alternatively, it can assert standing solely as the representative of its members." Id. To proceed as the representative of its

members, the organization must demonstrate that: (1) "its members would otherwise have standing to sue in their own right;" (2) "the interests it seeks to protect are germane to the organization's purpose;" and (3) "neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." Id.

The New Hampshire Supreme Court, on the other hand, has not decided whether political parties have organizational standing to petition for declaratory judgment. See N.H. Democratic Party v. Sec'y of State, 174 N.H. 312 (2021) (affirming injunction after superior court determined NHDP had organizational standing sufficient to petition under RSA 491:22); but see Duncan v. State, 166 N.H. 630, 640 (2014) ("[W]hen questions of jurisdiction have been passed on in prior decisions *sub silentio*, this Court has never considered itself bound when a subsequent case finally brings the jurisdictional issue before us.") (quoting Hagans v. Lavine, 415 U.S. 528, 535 n.5 (1974)). Thus, when political party plaintiffs have asserted organizational standing in the superior court, they have reached different outcomes. See N.H. Democratic Party v. Gardner, No. 226-2017-CV-00433, 2018 WL 5929044 (N.H. Super. Apr. 10, 2018) (finding organizational standing for the NHDP and League of Women Voters of New Hampshire based on a diversion of resources theory); 603 Forward v. Scanlan, No. 226-2022-CV-00233, 2023 WL 7326368 (N.H. Super. Nov. 1, 2023) (dismissing organizational plaintiff's claim under a diversion of resources theory because plaintiffs lacked a legal or equitable right sufficient to confer standing to challenge the validity of a statute).

While constitutional standing only requires that a plaintiff suffer an injury in fact, the New Hampshire Supreme Court has stated that a plaintiff must show more to

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petition for declaratory judgment under RSA 491:22. Avery v. N.H. Dep't of Educ., 162 N.H. 604, 608 (2011). Rather, a party only has standing to petition for declaratory judgment "where the party alleges an impairment of a present legal or equitable right arising out of the application of the rule or statute under which the action has occurred." Id. Considering this distinction, the New Hampshire Supreme Court has dismissed declaratory claims where an organization seeks to file suit on behalf of its members. See Benson v. N.H. Ins. Guar. Ass'n, 151 N.H. 590, 593 (2004) (holding that a medical society which represented doctors lacked standing under RSA 491:22).

However, the New Hampshire Supreme Court has also described a petition for declaratory judgment as "particularly appropriate to determine the constitutionality of a statute when the parties desire and the public need requires a speedy determination of important public interests involved therein." Boehner v. State, 122 N.H. 79, 83 (1982), and has stated that the declaratory judgment statute "should not be restricted by a narrow interpretation of its scope." Faulkner v. City of Keene, 85 N.H. 147, 155 (1931). Specifically, the Faulkner court noted the insignificance of the distinction between constitutional standing and standing for declaratory judgment by stating:

> It should also be said that under our liberal practice the distinction between causes that properly come under the provisions of the [declaratory judgment] act of 1929 and those maintainable without the aid of that statute is not of much practical importance. The cause being plainly presented to the court, the appropriate remedy will be granted, however erroneously the proceeding be entitled.

Id. at 201. Although the court was interpreting the original Declaratory Judgment Act of 1929, that law contained the same language as RSA 491:22 requiring a "legal or equitable right or title." Id. at 197.

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Considering the foregoing, the Court determines that the plaintiffs' alleged diversion of resources, along with their representative capacity on behalf of voters and candidates with constitutional rights to vote and to be elected, confers them with organizational standing sufficient to petition for declaratory judgment under RSA 491:22. Beyond the practical guidance of Faulkner and the federal recognition of organizational standing, the Court further finds that policy considerations favor allowing political parties to contest the constitutionality of election laws. As recognized by the legislature in the text of SB 418 itself, there is a significant public interest in ensuring that New Hampshire elections remain free of corruption. This concern is also reflected in our state constitution, which mandates that "[a]ll elections are to be free, and every inhabitant . . . shall have an equal right to vote in any election . . . [and] to be elected into office." N.H. CONST. pt. I, art. 11. If courts prevent political parties from challenging election laws on behalf of their members, the duty to ward off potentially discriminatory and unconstitutional election laws will fall upon private individuals, who would be required to proactively identify and legally challenge potentially problematic legislation, and likely to do so without the resources, support, or political drive to mount such a challenge. Further, any harm that may result from improper election procedures cannot easily be remedied after the fact. Denying standing would impose an unnecessary hurdle against the public interest in ensuring New Hampshire voters are able to vote in elections free of corruption and would be inconsistent with the purpose of our declaratory judgment statute. See Beaudoin v. State, 113 N.H. 559, 562 (1973) (declaratory judgment is a "broad remedy which should be liberally construed so as to effectuate the evident statutory purpose of making a controversy over a legal or equitable right justiciable at an

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earlier stage of the controversy than it would be if the matter were pursued in an action at law or in equity.").

Accordingly, the Court determines that the concept of organizational standing provides the plaintiffs with a legal right sufficient to petition for declaratory judgment under RSA 491:22.

II. Failure to State a Claim

a. Count I – Return of Votes Clause under Part II, Article 32

The plaintiffs contend that SB 418 is facially unconstitutional because it prevents town clerks from reporting the number of qualified votes to the Secretary of State within five days of an election as mandated by Part II, Article 32, which states:

> 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.

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The State and Intervenors argue that there is no requirement that the town clerk's report be a final value and, therefore, the fact that town clerks may need to make adjustments to the number of votes after the five-day report is complied with does not violate the constitutional mandate.

"In reviewing a legislative act, [the Court] presume[s] it to be constitutional and will not declare it invalid except upon inescapable grounds." Contoocook Valley Sch. Dist. v. State, 174 N.H. 154, 161 (2021). "This presumption requires that [the Court] will

hold a statute to be constitutional unless a clear and substantial conflict exists between it and the constitution." Id. "When doubt exists as to the constitutionality of a statute, those doubts must be resolved in favor of its constitutionality." Id. "The party challenging a statute's constitutionality bears the burden of proof." Id.

A party "may challenge the constitutionality of a statute by asserting a facial challenge, an as-applied challenge, or both." State v. Hollenbeck, 164 N.H. 154, 158 (2012). "A facial challenge is a head-on attack of a legislative judgment, an assertion that the challenged statute violates the Constitution in all, or virtually all, of its applications." Id. "A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." State v. Furgal, 161 N.H. 206, 210 (2010). "In other words, [the Court] will not hold a statute to be unconstitutional unless a clear and substantial conflict exists between it and the constitution." N.H. Ass'n of Cntys. v. State, 158 N.H. 284, 288 (2009).

Even when drawing all reasonable inferences in the light most favorable to the plaintiffs, the Court determines that the mere uncertainty that SB 418 could prevent town clerks from complying with their constitutional duties does not create a "clear and substantial conflict with the constitution" necessary to maintain their action.

In coming to this conclusion, the Court finds N.H. Association of Counties instructive. In that case, the challenged statute, SB 409, required counties to pay a share of the cost for the medical care of elderly persons through certain programs. Id. at 286–87. While the statutes mandating payments to those programs were to be repealed, SB 409 contained a sunset provision extending the counties obligations to

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pay. Id. at 287. The state then continued to extend the sunset provision for several years. Id. The plaintiffs in that case challenged the constitutionality of SB 409, arguing that it violated Article 28-a of the New Hampshire Constitution, which prohibited the state from requiring additional expenditures by political subdivisions unless such programs were fully funded by the state or approved by vote of the subdivision's legislative body. Id. at 288. However, the New Hampshire Supreme Court determined that it was uncertain whether SB 409 would impose additional financial expenditures by counties, and therefore SB 409 was not unconstitutional. Id. at 289. The Court reasoned that "no new, expanded, or modified program or responsibility had been enacted, or, to the extent that it has, there is no requirement of additional local expenditures and thus no violation of Article 28-a." Id. Further, the Court noted that because the state had statutory authority to place a cap on the county spending, the state could choose to do so to prevent a constitutional violation. Id. at 291.

Like the statutory scheme applicable in N.H. Association of Counties, SB 418 employs a statutory cap, albeit one that limits the number of days available to a voter to return their verification letter. While an affidavit voter may have a maximum of seven days to comply with the statute, they could also comply by proving their identity on the first, second, third, fourth, fifth, or sixth day after the election. Thus, whether the town's report on the fifth day following the election truly represents the number of qualified votes is uncertain and depends on the rate at which affidavit ballot voters submit their identity-proving documentation to the Secretary of State. As exemplified by N.H. Ass'n of Cntys., the Court determines such uncertainty does not rise to the level of a "clear and substantial conflict" with the constitution. See id. at 288.

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Accordingly, because the Court determines that Count I of the plaintiffs' complaint does not state a claim upon which relief may be granted, the State and intervenors' motion to dismiss this count is GRANTED.

b. Count II – Procedural Due Process under Part I, Article 15

The plaintiffs allege SB 418 violates procedural due process under Part I, Article 15 because the law does not provide voters sufficient time to submit identity-proving documents and fails to notify or provide a hearing to voters whose votes are disqualified, which unnecessarily risks erroneous deprivation of their members' rights to vote and be elected as protected by Part I, Article 11. The plaintiffs further allege that because SB 418 does not require state or local officials inform voters when they are included on the list sent to the Secretary of State for potential investigation due to their failure to cure their identity, SB 418 violates their right to procedural due process as a result of the stigma that attaches due to their inclusion on that list.

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The State and intervenors argue that the plaintiffs do not have an interest that entitles them to due process protection. Alternatively, the State and intervenors contend that the plaintiffs' allegations fail to state a claim that New Hampshire's election laws provide insufficient process regarding voting rights. The intervenors additionally contend that this Court should dismiss the plaintiffs' procedural due process claim because they failed to challenge SB 418 as burdening the right to vote under Part I, Article 11, and a procedural due process claim is not a mechanism to challenge the state's election laws.

The Court recognizes the intervenors argument that the plaintiffs have not specifically asserted a challenge to SB 418 based on the burden on the right to vote

under Part I, Article 11. Indeed, Part I, Article 11 has served as a traditional vehicle for plaintiffs, including the NHDP, to challenge New Hampshire election laws regarding voter qualification. See N.H. Democratic Party, 174 N.H., Guare v. State, 167 N.H 658, 663 (2015). In challenges under Part I, Article 11, New Hampshire courts apply a unique balancing test to determine the level of scrutiny based on the severity of the restriction of the right to vote. See Guare, 167 N.H. at 663. Instead, here the plaintiffs argue that the right to procedural due process attaches to the right to vote and to be elected, and that the process within SB 418 is insufficient in protecting against an erroneous deprivation of that right in comparison to the State's interest.

In Arizona Democratic Party v. Hobbs, 485 F. Supp. 3d 1073, 1093 (D. Ariz. 2020), the United States District Court for the District of Arizona grappled with the same uncertainty the Court faces here – whether to analyze a due process claim implicating the right to vote under the traditional procedural due process framework or, rather, under the framework applicable to the burdening of the right to vote. In the federal context, the Hobbs court found the distinction insignificant because the court determined the plaintiffs prevailed under both relevant frameworks. Id. On appeal, the United States Court of Appeals for the Ninth Circuit agreed with the Fifth and Eleventh Circuits that the federal voting rights framework (referred to as the Anderson/Burdick framework) was "better suited to the context of election laws than is the more general Eldridge [traditional due process] test." Arizona Democratic Party v. Hobbs, 18 F.4th 1179, 1195 (9th Cir. 2021). Faced with the same dilemma as the trial court in Hobbs, this Court analyzes the plaintiffs' procedural due process claim under both the

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traditional procedural due process framework and the framework applied when voting rights are alleged to be burdened.

Analysis under Traditional Procedural Due Process

"In determining whether challenged procedures satisfy the due process requirement, [the Court] employ[s] a two-part analysis." Petition of Bagley, 128 N.H. 275, 282 (1986). "First, [the Court] determine[s] whether the challenged procedures concern a legally protected interest." Id. at 282–83. "Second, [the Court] determine[s] whether the procedures afford the requisite safeguards." Id. In analyzing whether the procedures afford requisite safeguards, the Court considers three factors: "(1) the private interest that will be 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." State v. Ploof, 162 N.H. 609, 619 (2011).

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Regarding the first factor, the plaintiffs have asserted that SB 418 will affect their members' constitutional rights to vote and to be elected. The Court determines that such constitutional rights are subject to the protection of due process. See N.H. CONST. pt. I, art. 11 (providing New Hampshire inhabitants with a constitutional right to vote and to be elected into office); Wesberry v. Sanders, 376 U.S. 1, 17 ("No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live.").

Regarding the second factor, the plaintiffs allege that SB 418 will result in the disenfranchisement of their voters because a large number of New Hampshire democratic voters tend to be young, non-white, low-income persons who are more

prone to utilize same-day registration. The plaintiffs further allege that such persons are more likely to have difficulty in acquiring identity-proving documentation within the seven day period. To stress the severity of this disenfranchisement, the plaintiffs have provided data demonstrating that nearly 10% of New Hampshire voters utilized same-day registration in the 2020 general election.

In accepting the plaintiffs' allegations as true and making all reasonable inferences in their favor, for the purposes of this analysis, it can be reasonably inferred that SB 418, a procedure which only applies to first-time voters in New Hampshire who register on election day without documentation of their identity, poses a risk of depriving some qualified voters of their right to vote. In coming to this conclusion, the Court finds recent litigation regarding SB 3, a law regarding proof of domicile, illustrative.

In League of Women Voters of N.H. v. Gardner, No. 226-2017-CV-00433, 2020 WL 4343486, at *5-9 (N.H. Super. Apr. 8, 2020), the trial court addressed similar voting qualification procedures enacted under SB 3, but had before it a fully developed summary judgment record, including expert reports as to the burden the procedures had on the right to vote. Ultimately, the court determined SB 3 was unconstitutional and granted summary judgment and an injunction in favor of the plaintiffs because SB 3 imposed a significant restriction on the right to vote.[2] Id. at *12. On appeal, the New Hampshire Supreme Court upheld the trial court's order. See N.H. Democratic Party, 174 N.H. at 314.

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[2] While League of Women Voters of N.H. analyzed the burden on the right to vote under Part I, Article 11, and not Part I, Article 15 as the plaintiffs assert, this Court finds that analysis relevant to the risk of erroneous deprivation that SB 418 may impose.

Here, the plaintiffs have alleged that SB 418 will disenfranchise democratic voters in a similar manner to the litigation in SB 3. While the SB 3 case was decided in relation to Part I, Article 11, the Court finds such potential voter disenfranchisement, if shown, could result in a risk of erroneous deprivation to the right the vote and to be elected. Therefore, without the benefit of a fully developed record the Court cannot analyze the balance between the risk of deprivation of the right to vote or be elected to the State's interest in preventing voter fraud.

Accordingly, the Court determines that, at this early pleading stage, the plaintiffs have sufficiently pled a claim under a traditional due process framework. The parties are directed to develop an expedited discovery schedule for further development of the record, and submit it to the Court by April 22, 2024.

Analysis under Voting Rights Framework

"Although the right to vote is fundamental, [the Court] do[es] not necessarily subject *any* impingement upon that right to strict scrutiny." Guare, 167 N.H. at 663 (emphasis in the original). "Instead, [the Court] appl[ies] a balancing test to determine the level of scrutiny that [the Court] must apply." Id. "When [voting] rights are subjected to severe restrictions, the regulation must be narrowly drawn to advance a state interest of compelling importance." Id. (quotation omitted). "But when a state election law provision imposes only reasonable, nondiscriminatory restrictions upon the right of voters, the State's important regulatory interests are generally sufficient to justify the restrictions." Id. However, "[m]ost cases fall in between these two extremes." Id.

At the pleading stage, the Court cannot find that SB 418 imposes only reasonable, nondiscriminatory restrictions on the right to vote. First, SB 418 is not

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uniformly applied. Rather, the law only applies to first-time New Hampshire voters using same-day registration. As alleged by the plaintiffs, and as described above, a significant percentage of New Hampshire voters register to vote on election day, and the highest number of those voters tend to be young, non-white, and/or low-income, and vote for democratic candidates. Thus, it is reasonable to infer that the application of SB 418 could more severely burden the right to vote of young, non-white, and/or low-income voters than others.

Accordingly, the Court determines the plaintiffs have sufficiently plead a claim for relief under the voting rights framework, as described in Guare, 167 N.H. at 663-64.

Preliminary Injunction

The plaintiffs argue that they are entitled to preliminary injunctive relief based on two state constitutional claims that should be resolved before SB 418 suppresses any votes in upcoming elections. (Court index #3 at 8.)

"The issuance of injunctions, either temporary or permanent, has long been considered an extraordinary remedy." N.H. 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. To issue a preliminary injunction, the Court must determine the plaintiff: (1) has no adequate remedy at law; (2) faces an immediate danger of irreparable harm; and (3) is likely to succeed on the merits. Id. This Court has "sound discretion to grant an injunction after consideration of the facts and established principles of equity." Id.

The Court determines, for the reasons articulated above including the lack of a specifically named voter or candidate whose right to vote or be elected has been

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infringed by SB 418, that while the plaintiffs pleaded sufficient allegations to prevail against the State and intervenors' motion to dismiss Count II, they have not demonstrated that absent preliminary relief, irreparable harm will result.

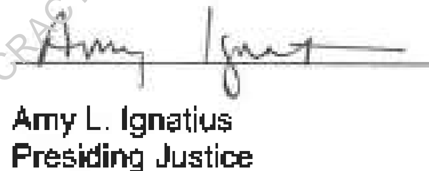
Accordingly, the plaintiffs' motion for preliminary injunctive relief is DENIED.

Conclusion

For the foregoing reasons, the State's and intervenors' motions to dismiss are GRANTED with respect to Count I and DENIED with respect to Count II, and the plaintiffs' motion for preliminary injunction is DENIED.

SO ORDERED.

April 16, 2024



Amy L. Ignatius
Presiding Justice

Clerk's Notice of Decision
Document Sent to Parties
on 04/17/2024

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