

THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS

SUPERIOR COURT

Docket No. 226-2023-CV-00613

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

**DEFENDANTS' OBJECTION TO
THE PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION**

The Defendants, David Scanlan, in his official capacity as New Hampshire Secretary of State, and John Formella, in his official capacity as New Hampshire Attorney General, through their counsel, the New Hampshire Department of Justice, object to the Plaintiffs' request for a preliminary injunction.

I. **Introduction:**

1. The Plaintiffs, the Democratic National Committee and the New Hampshire Democratic Party, allege that Laws 2022, Chapter 239, which requires a narrow class of voters to vote by affidavit ballot pursuant to RSA 659:23-a, violates Part II, Article 32 and the due process guarantees of the State Constitution. Laws 2022, Chapter 239 requires a voter to vote by affidavit ballot only if the voter seeks to register to vote for the first time New Hampshire on an election day and without sufficient proof of identity. A voter's affidavit ballot is initially counted, but their votes are subsequently deducted from

election results if the voter does not provide a photocopy of valid photo identification to the Secretary of State's Office within seven days following an election. The Plaintiffs seek a preliminary injunction enjoining the Defendants from enforcing Laws 2022, Chapter 239.

2. The Plaintiffs' request for preliminary injunctive relief must be denied because the Plaintiffs cannot demonstrate an immediate danger that the Plaintiffs will be irreparably harmed by Laws 2022, Chapter 239. Despite the fact that the law has been in place for nearly a year before the Plaintiffs filed their lawsuit, the Plaintiffs have not identified a single member of their parties or other voter who voted by affidavit ballot, let alone a voter who was unable to provide proof of identification within seven days of voting by affidavit ballot. Moreover, the Plaintiffs' present claims of "immediate danger of irreparable injury" are belied by the fact that the Plaintiffs took no action to educate voters regarding the affidavit ballot process and waited nearly a year to file a lawsuit challenging the law.

3. The Plaintiffs' request for preliminary injunctive relief must also be denied because the Plaintiffs cannot prove a likelihood of success on the merits because, as explained in the Defendants' motion to dismiss, the Plaintiffs lack standing and the Plaintiffs' claims fail as a matter of law.

II. **Background:**

4. The Legislature enacted Laws 2022, Chapter 239, which created a procedure for the use of affidavit ballots in certain, limited circumstances. See RSA 659:23-a (requiring a voter to vote by affidavit ballot only if the voter registers to vote for the first time in New Hampshire on election day without valid photo identification or otherwise

meeting the identity requirements of RSA 659:13, II). A voter who votes by affidavit ballot must provide a photocopy of valid identification to the Secretary of State's Office within seven days following an election, or else the voter's affidavit ballot is retrieved and the votes on that ballot are deducted from final election results. See RSA 659:23-a. This process is explained in more detail in the Defendants' motion to dismiss and in the Secretary of State's February 10, 2023, guidance letter to New Hampshire election officials, which is attached as Exhibit F to the Plaintiffs' complaint.

5. On December 22, 2023, almost a year after Laws 2022, Chapter 239 went into effect, the Plaintiffs brought this action, seeking preliminary and permanent injunctive relief to prohibit the Defendants from enforcing Laws 2022, Chapter 239.

6. The Plaintiffs allege that Laws 2022, Chapter 239 violates Part II, Article 32 of the State Constitution and the procedural due process rights of affected voters.

7. Although the Plaintiffs have not identified any member of their parties that has been or will be subject to RSA 659:23-a's affidavit ballot procedure, the Plaintiffs nevertheless argue that they are individually harmed because: (1) the law will prevent or deter people who would vote for democratic party candidates from doing so, see Pls. Compl. ¶13; (2) the Plaintiffs "will have to engage in a broad-based education program targeting thousands of New Hampshire Democratic voters as well as Democratic candidates," see Pls. Compl. ¶14; and (3) the law will "interfere" with the Plaintiffs' core mission of electing Democratic candidates," see Pls. Compl. ¶15.

8. Although Laws 2022, Chapter 239 has been in effect for more than a year, the Plaintiffs have not alleged any facts identifying: (1) a single person who was prevented or deterred from registering to vote or voting because of the law; (2) a single member of

either of their political parties who voted by affidavit ballot; (3) a single person who voted by affidavit ballot for Democratic candidates; (4) a single person of any political affiliation who voted by affidavit ballot for any party's candidates; (5) a single qualified voter who was unable to complete the required affidavit ballot verification letter within the prescribed seven-day time period; or (6) a single voter who submitted an affidavit ballot verification letter that the Secretary of State's office "rejected."

9. Nor do the Plaintiffs allege any other facts to demonstrate existing harm to either of their organizations. The Plaintiffs allege that as a result of the law, which has been in place for more than a year, their organizations "will have to" take certain actions, and they further speculate as to what those future actions "will likely include." See Pls.

Compl. ¶14. However, the Plaintiffs do not allege that either of them has presently spent even a single dollar educating voters regarding the affidavit ballot procedure, let alone that they have "engage[d] in a broad-based education program targeting thousands of New Hampshire Democratic voters as well as Democratic candidates." See Pls.

Compl. ¶14.

III. Standard of Review:

10. The issuance of injunctions, either temporary or permanent, is an extraordinary remedy. See N.H. Dep't of Envtl. 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. A plaintiff cannot obtain injunctive relief unless they demonstrate (1) "an immediate danger of irreparable harm to the party seeking injunctive relief"; (2) that there is "no adequate remedy at law"; and (3) that the plaintiff will "likely succeed on the merits." Id.

IV. **The Plaintiffs are not entitled to preliminary injunctive relief.**

11. The Plaintiffs cannot demonstrate an immediate danger of irreparable harm to the Plaintiffs or that they will likely succeed on the merits.

A. **The Plaintiffs cannot demonstrate an immediate danger of irreparable harm.**

12. To obtain preliminary injunctive relief, a plaintiff must demonstrate “an immediate danger of irreparable harm.” See N.H. Dep’t of Env’tl. Servs., 155 N.H. at 63. Significantly, the person in danger of irreparable harm must be “the party seeking injunctive relief.” *Id.* (emphasis added).

13. The Plaintiffs challenge Laws 2022, Chapter 239, which requires a voter in a narrow, limited circumstance to vote by affidavit ballot. In other words, Laws 2022, Chapter 239 creates a voting procedure that certain voters must follow. However, neither Plaintiff has any right to vote in New Hampshire, and Plaintiff will ever have to vote using this affidavit ballot procedure. Therefore, Laws 2022, Chapter 239’s affidavit ballot voting procedure will never directly harm the Plaintiffs.

14. The Plaintiffs first suggest that they may nevertheless be injured because the law “will prevent or deter people who would vote for democratic party candidates from doing so.” *Pls. Compl.* ¶13. However, the Plaintiffs have not identified a single person who Laws 2022, Chapter 239 allegedly “prevented or deterred” from voting. This is not surprising, as Laws 2022, Chapter 239’s affidavit ballot procedure will never apply to any voter who has previously registered to vote in New Hampshire, which necessarily includes every registered member of the New Hampshire Democratic Party.

15. The Plaintiffs next suggest that they may be injured because they “will have to engage in a broad-based education program targeting thousands of New Hampshire

Democratic voters as well as Democratic candidates.” Pls. Compl. ¶14. Notably, the Plaintiffs state in the future tense that they “will have to engage” in this education program, implicitly admitting that the Plaintiffs have not engaged in such a program to date. Laws 2022, Chapter 239 has been in effect for more than a year, including for (i) every town election in March, April, and May of 2023; (ii) every city election in November of 2023, including city primary elections; and (iii) five special elections for vacant house of representative seats, including associated primary elections.¹ The fact that this law has been in place for more than a year without the Plaintiffs taking any steps to “engage in a broad-based education program” belies the Plaintiffs’ claims that they have been injured, let alone that Laws 2022, Chapter 239 creates an “immediate danger of irreparable harm” to the Plaintiffs.

16. Finally, the Plaintiffs suggest without developed argument or factual support that Laws 2022, Chapter 239 will “interfere” with the Plaintiffs’ core mission of electing Democratic candidates.” Pls. Compl., ¶15. As described above, Laws 2022, Chapter 239 has been in effect for every election in the past year. Thus, it is telling that the Plaintiffs have not identified even: (1) a single voter who voted by affidavit ballot, for democratic candidates or otherwise; (2) a single voter such voter who subsequently failed to provide proof of identity as required by RSA 659:23-a; or (3) a single such voter who failed to provide proof of identity but who was qualified to vote under Part I, Article 11 of the State Constitution.

¹ Strafford County District 8 on February 21, 2023; Hillsborough County District 3 on May 16, 2023, and November 7, 2023; Rockingham County District 1 on September 19, 2023; and Grafton Count District 16 on August 22, 2023. Information regarding 2023 special elections is publicly available on the Secretary of State’s website at <https://www.sos.nh.gov/elections/2023-2024-special-elections>.

17. In sum, the Plaintiffs suggest without factual support that Laws 2022, Chapter 239 presents an immediate danger of irreparable harm to them, but the Plaintiffs' suggestion is belied by the fact that the Plaintiffs: (1) waited almost an entire year before deciding to challenge Laws 2022, Chapter 239; (2) took no action in the preceding year or otherwise to "engage in a broad-based education program"; and (3) have not identified a single party member or voter who was allegedly harmed during an election in the past year by Laws 2022, Chapter 239's affidavit ballot procedure.

B. The Plaintiffs cannot demonstrate that there is no adequate remedy at law:

18. To obtain preliminary injunctive relief, a plaintiff must also demonstrate that they are likely to succeed on the merits. See N.H. Dep't of Envtl. Servs., 155 N.H. at 63.

19. Under separate cover, the Defendants have moved to dismiss for lack of standing and for failure to state a claim. For the reasons stated in that motion to dismiss, the Plaintiffs cannot demonstrate a likelihood of success on the merits because the Plaintiffs lack standing and because the Plaintiffs' claims fail as a matter of law.

20. The Plaintiffs have not alleged any facts to support their claim that they have been harmed by Laws 2022, Chapter 239. Even if this Court were to consider the alleged harm that Laws 2022, Chapter 239 might cause an individual voter (which is not a claim the Plaintiffs have standing to assert), the Plaintiffs have not alleged any facts or provided any evidence of even a single voter who was qualified to vote in New Hampshire, who voted by affidavit ballot, and who was unable to provide proof of identification within seven days of voting by affidavit ballot. The Plaintiffs unsupported, conclusory, and speculative statements regarding the alleged harm that Laws 2022, Chapter 239 might

cause a hypothetical voter are not sufficient to demonstrate a likelihood of the plaintiffs succeeding on the merits.

WHEREFORE, the Defendants respectfully request that this Honorable Court:

- A. Deny the Plaintiffs' request for preliminary injunctive relief;
- B. Grant such other and further relief as justice may require.

Respectfully submitted,

DAVID SCANLAN,
SECRETARY OF STATE;

AND

JOHN FORMELLA,
ATTORNEY GENERAL

By their attorney,

JOHN M. FORMELLA
ATTORNEY GENERAL

Date: February 5, 2024

By: /s/ Brendan A. O'Donnell
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing motion was sent via the Court's electronic filing system to all parties of record.

Date: February 5, 2024

/s/ Brendan A. O'Donnell
Brendan A. O'Donnell.