THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS. SUPERIOR COURT

Case No. 226-2023-CV-00613

DEMOCRATIC NATIONAL COMMITTEE and
NEW HAMPSHIRE DEMOCRATIC PARTY,

Plaintiffs,
v.

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

Defendants,

and

REPUBLICAN NATIONAL COMMITTEE and
NEW HAMPSHIRE REPUBLICAN STATE COMMITTEE,

Intervenors.

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' OBJECTIONS TO DEFENDANTS' AND INTERVENORS' MOTIONS TO DISMISS

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INTRODUCTION

Neither defendants nor intervenors offer any sound basis to dismiss this constitutional challenge to Senate Bill 418. By creating a new type of ballot that counts only if the voter who casts it subsequently completes a burdensome identity-verification process (one that can be completed up to seven days after an election), S.B. 418 violates both the New Hampshire Constitution's deadline for an initial tally of votes and its guarantee of due process.

Even S.B. 418's proponents have questioned the law's constitutionality and called for judicial review of it. One such proponent is defendant David Scanlan; as the complaint explains, he warned at a hearing on the bill that "there are constitutional questions that need to be addressed," and he urged the legislature to "ask [the New Hampshire Supreme Court] for an advisory opinion on those questions." Compl. Ex. D (Apr. 8, 2022 House Election Law Committee Hearing Transcript) at 55. He later reiterated to the media that he remained convinced that "there may be a constitutional issue" with the legislation. DeWitt, *As Sununu Indicates Support, Legal Questions Around 'Provisional Ballot' Bill Persist*, New Hampshire Bulletin (June 7, 2022), *quoted in* Compl. ¶5.[1] Indeed, Secretary Scanlan said the legislation "should be sent to the court for an opinion," but added that "if the bill becomes law," he would "administer it and leave it up to somebody else" to resolve the constitutional issues. *Id.*[2]

The "somebody else" charged with resolving the constitutionality of S.B. 418 is the judicial system, and the time to resolve the law's constitutionality is now, so that New

[1] https://newhampshirebulletin.com/2022/06/07/as-sununu-indicates-support-legal-questions-around-provisional-ballot-bill-persist/ (all websites cited herein were visited February 20, 2024).

[2] "In reviewing a motion to dismiss," courts may consider "documents sufficiently referred to in the complaint." *Automated Transactions, LLC v. Am. Bankers Ass'n*, 172 N.H. 528, 532 (2019).

Hampshire residents will not be deprived of their fundamental right to vote. Yet defendants and intervenors now ask the Court to dismiss this case.

That request should be rejected. Defendants' standing arguments ignore established precedent, and are at odds with intervenors' participation in this case. And on the merits, S.B. 418 unquestionably conflicts with part 2, article 32, of the state constitution, which affords local officials only "five days following [an] election" to report a tally of votes cast by persons "qualified to vote," N.H. Const. pt. 2, art. 32. By giving those who register and vote on election day without providing adequate proof of identity up to seven days to submit such proof, S.B. 418 makes it all but impossible to know which voters were "unqualified" until "the seventh day after [an] election," S.B. 418 §2, V. (It would be impossible unless there either were *no* election-day registrants in an election, or *all* election-day registrants (1) brought the necessary "qualifying documents" with them to the polls, (2) were personally recognized by election officials, or (3) completed the verification process two days before the deadline.) Defendants and intervenors eschew this conflict between article 32 and S.B. 418 by mischaracterizing what plaintiffs say the constitution requires within five days: not a conclusive election result, but a tally of votes cast by those "qualified to vote," N.H. Const. pt. 2, art. 32. S.B. 418 also violates the state constitution's procedural-due-process guarantee, N.H. Const. pt. 1, art. 15; defendants' and intervenors' counterarguments misapprehend both the statute's consequences and the constitution's requirements.

The motions to dismiss should be denied so that this Court can address the constitutional defects that even Secretary Scanlan has said warrant judicial review.

BACKGROUND

A. S.B. 418 Overhauled New Hampshire's Rules For Election-Day Registration And Voting

For nearly three decades, New Hampshire has allowed people to register and vote on election day.

1. To register to vote, an applicant must complete a voter-registration form and present proof of domicile and identity. RSA 654:12, I. An applicant without acceptable documentation of these prerequisites has long had to attest under penalty of felony that he or she meets them. RSA 654:12, I(a)-(b). Those who do so have also had to have their photographs taken and were mailed a request for written verification that they in fact registered and voted. RSA 654:12, III-a, V(b). If such a mailing was returned as undeliverable, the secretary of state's office would conduct an inquiry to identify the voter, and would refer to the attorney general for further investigation any applicant whose identity and qualifications the secretary was unable to confirm. RSA 654:12, V(e).

In 2017, the New Hampshire legislature enacted a law known as S.B. 3, which required people who registered on or within thirty days of election day to verify their domicile, either by delivering documentation to the secretary of state or by agreeing to have state officials take action to verify their domicile. *See* N.H. Laws 2017, chapter 2015 (amending RSA 654:7, 654:7-a, and 654:12). When the New Hampshire Democratic Party challenged S.B. 3, the New Hampshire Supreme Court declared it unconstitutional. *N.H. Democratic Party v. Sec'y of State*, 174 N.H. 312, 332 (2021). After that, individuals without proof of identification could (until S.B. 418 became law) register to vote at their polling place on election day using the attestation process described above, and could then cast ballots that were treated the same as all others.

2. S.B. 418, which took effect January 1, 2023, turned this system on its head. The legislature's stated concern in enacting the statute was that although New Hampshire law "identifie[d] when unqualified votes have been cast," it did "nothing to prevent" unqualified voters from casting ballots in the first place. S.B. 418 §1, II. Accordingly, the statute forces anyone seeking to register and vote on election day without documentary proof of identity to submit a new type of provisional ballot, known as an "affidavit ballot," that is deemed to have been "cast by [an] unqualified voter[]" unless the voter provides "documents required to qualify to vote" within seven days of the election. *Id*. §2, II(b), VI. S.B. 418 thus does with respect to identification what S.B. 3 did with respect to domicile: It subjects election-day voters—and no one else—to a burdensome identity-verification process.

More specifically, under S.B. 418, a person registering for the first time in New Hampshire on election day without proof of identity will—unless an election official present claims to personally recognize the person—be handed two things: (1) an "affidavit ballot," S.B. 418 §2, I, and (2) an "affidavit voter package" containing (a) a prepaid envelope addressed to the secretary of state and (b) an "affidavit voter verification letter, in duplicate form, which lists all the documents required to qualify to vote in the state of New Hampshire," *id*. §2, II(b). An election official at the polling place will then "mark on both copies of the verification letter which qualifying documents were not provided" by the voter. *Id*. One copy of this letter is retained by the official, while the other is given to the voter, who must return it to the secretary of state (along with sufficient documentation—which those who register without documentation prior to election day need *not* provide) "within 7 days of the date of the election in order for the

ballot to be certified." *Id*. The voter must also, as was required before S.B. 418, complete the attestation process by signing an affidavit, and then have his or her photograph taken. *Id*. §4.[3]

To enable election officials to trace each affidavit ballot back to the voter who cast it, S.B. 418 requires officials to "mark each affidavit ballot 'Affidavit Ballot #__' sequentially, starting with the number '1.'" S.B. 418 §2, III. After a voter casts his or her numbered affidavit ballot, it is segregated from other ballots and "placed in a container designated 'Affidavit Ballots.'" *Id*. §2, IV.

S.B. 418 requires election officials to send, within a day after any election, the retained copies of "all affidavit ballot verification letters to the secretary of state." S.B. 418 §2, IV. And after the seventh day following the election, if a voter has not delivered to the secretary the voter's copy of his or her verification letter along with "qualifying documentation" (which, again, non-election-day registrants who register without documentation need not submit), the secretary must instruct the appropriate local election official to "retrieve the associated numbered affidavit ballot and list on a tally sheet, by candidate or issue, the votes cast on that ballot." *Id*. §2, V. "The votes on such unqualified affidavit ballots shall be deducted from the vote total for each affected candidate or each affected issue." *Id.* Then, "[n]o later than 14 days after the election," local election officials must "provide to the secretary of state a summary report, by race or ballot issue, of the total votes cast by the unqualified voters." *Id*. §2, VI. In other words, "[t]he 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*.

[3] Secretary Scanlan has represented to this Court that he will not apply S.B. 418 to individuals who register before election day, and this Court has interpreted the law in accordance with that representation. *See 603 Forward v. Scanlan*, 2023 WL 7326368, at *3 (N.H. Super. Ct. Nov. 1, 2023).

Affidavit-ballot voters who are determined to be "unqualified" are not just disenfranchised, however. S.B. 418 also requires the secretary of state to compile "[t]he names of affidavit voters whose verification letters are either not returned to the secretary … or which do not provide the required voter qualifying information," and to refer those people "to the New Hampshire attorney general's office for investigation in accordance with RSA 7:6-c"—a statute that authorizes criminal prosecution. S.B. 418 §2, VII.

As noted, election-day registrants who do not provide sufficient documentation of identity when registering are nonetheless excused from S.B. 418's affidavit-ballot scheme if an election official on site claims to personally recognize them. S.B. 418 §5. Such voters can submit a regular ballot and need not complete any verification process in order for their vote to be counted. That is so even if—as will likely be true in almost all such situations—there is no verification whatsoever of the election official's claim to recognize the voter.

B. S.B. 418 Was Enacted Despite The Absence Of Voter Fraud In New Hampshire

S.B. 418 was enacted to (1) supplement laws that "identifie[d] when unqualified votes have been cast," and (2) "prevent the … casting, counting, and certification of illegitimate ballots." S.B. 418 §1, II. But there is no evidence that New Hampshire elections have been affected by attempts to vote fraudulently, let alone in ways that S.B. 418 would have prevented. Indeed, the single instance of double voting mentioned in the statute's legislative findings—involving a voter who cast ballots in both New Hampshire and Massachusetts in 2016, *id*.—almost certainly would not have been avoided by S.B. 418, which discounts ballots cast by voters without proof of identity, rather than without proof of domicile.

There is ample evidence, moreover, that the state's process for election-day registration prior to S.B. 418 was secure, and that "voter fraud [was] not widespread or even remotely

commonplace," *N.H. Democratic Party*, 174 N.H. at 318. Indeed, there were over a million votes cast in New Hampshire's 2020 elections, Rayno, *Election Statistics Show Growing Percentage of Independent Voters*, InDepthNH (Jan. 23, 2021),[4] *cited in* Compl. ¶24, including over 75,000 general-election votes by election-day registrants, *see 2020 General Election Results: Names on Checklist (Registered Voters)*, N.H. Sec'y of State.[5] Yet by early 2022, the state had not brought a single voter-fraud prosecution in connection with those elections. *See* Compl. Ex. C (Apr. 8, 2022 Letter from New Hampshire Attorney General). The absence of such prosecutions is consistent with Governor Sununu's statement after the 2020 elections that the state's elections "are secure, accurate, and reliable—there is no question about it." Press Release, *Governor Chris Sununu Statement Following Certification of 2020 Election Results* (Dec. 2, 2020),[6] *cited in* Compl. ¶37. The governor also confirmed just after those elections that "in New Hampshire there is no evidence of widespread voter fraud." Solender, *GOP N.H. Governor Calls Biden President-Elect, Says 'No Evidence' of Voter Fraud There*, Forbes (Nov. 12, 2020),[7] *cited in* Compl. ¶37. And he explained that a post-election audit was "proof that New Hampshire's voting process is the most reliable, safe, and secure in the country." Brown, *For Some Bills, the Legislative Session Is Just Beginning*, New Hampshire Business Review (June 28, 2021),[8] *cited in* Compl. ¶37.

[4] https://indepthnh.org/2021/01/23/election-statistics-show-growing-percentage-of-independent-voters/.

[5] https://www.sos.nh.gov/elections/2020-election-results/2020-general-election-results/.

[6] https://www.governor.nh.gov/news-and-media/governor-chris-sununu-statement-following-certification-2020-election-results.

[7] https://www.forbes.com/sites/andrewsolender/2020/11/12/gop-nh-governor-calls-biden-president-elect-says-no-evidence-of-voter-fraud-there/?sh=4a59855b2bb9.

[8] https://www.nhbr.com/for-some-bills-the-legislative-session-is-just-beginning/.

Indeed, even S.B. 418's proponents concede that New Hampshire did not have a voter-fraud problem before the law's enactment. For example, Secretary Scanlan testified at a hearing on the bill that "New Hampshire elections are sound" and indeed that he had "complete confidence in them." Compl. Ex. B (Jan. 20, 2022 Senate Elections Law & Municipal Affairs Committee Hearing Transcript) at 10-11. Likewise, Senator Bob Giuda, S.B. 418's lead sponsor, stated in that same hearing—in direct contradiction to the statute's asserted purpose—that the "bill was not targeting fraud." *Id*. at 1; *compare* S.B. 418 §1(II), *quoted supra* p.6.

The absence of any pre-S.B. 418 voter-fraud problem is unsurprising, as New Hampshire already had a comprehensive and effective voter-fraud prevention system. As explained, *see supra* p.3, state law already required all registration applicants to either present documentary proof of identity or attest to their identity under penalty of felony—and those who relied on attestation were subject to investigation by the attorney general.

C. S.B. 418 Was Enacted Despite Serious Doubts About Its Constitutionality

As discussed in the introduction, S.B. 418's proponents in the General Court ignored repeated warnings about the law's unconstitutionality—including from Secretary Scanlan and other supporters of the bill—and rebuffed the secretary's repeated requests to have those doubts resolved promptly by the judiciary.

At the first Senate hearing on S.B. 418, for example, Secretary Scanlan testified that there were "constitutional questions" as to whether a ballot could be "removed after … it's already been counted," as S.B. 418 requires. Compl. Ex. B at 10. And believing the bill "should not be simply … approved on its face," he recommended unsuccessfully that the Senate "send those questions to the [New Hampshire] Supreme Court" for an advisory opinion. *Id*.

At a later hearing, Senator James Gray (a supporter of S.B. 418) reported that he had "consult[ed] with various attorneys on the constitutionality of [the] Bill" and that "some said it

wasn't constitutional." Compl. Ex. D at 1, 17. Later at that hearing, Secretary Scanlan reiterated his "belie[f] that there are constitutional questions that need to be addressed"—including whether the bill was compatible with the state constitution's deadline for reporting election results—and he again requested, without success, that the legislature "send a Resolution to the Supreme Court and ask them for an advisory opinion on those questions." *Id*. at 55.

After the bill's passage, Secretary Scanlan repeated both his concern "that there may be a constitutional issue with it" and his view that the bill "should be sent to the court for an opinion." DeWitt, *supra* p.1 & n.1. He also observed that, "if the bill becomes law, then we're going to administer it and leave it up to somebody else" to resolve any constitutional issues. *Id.*

The bill became law when Governor Sununu signed it on June 17, 2022.

Shortly thereafter, several individual and organizational plaintiffs filed two lawsuits challenging the statute as unconstitutional. *See 603 Forward*, 2023 WL 7326368, at *2. In November 2023, this Court dismissed those lawsuits without reaching the merits of the plaintiffs' constitutional arguments. *Id.* at *5. This lawsuit was filed promptly after that dismissal..

LEGAL STANDARD

"A motion to dismiss must fail if the facts as pleaded by the plaintiff and all reasonable inferences drawn therefrom would constitute a basis for legal relief." *Williams v. O'Brien*, 140 N.H. 595, 597 (1995). With respect to standing, plaintiffs in "a declaratory judgment action" such as this need only "allege[] an impairment of a … right arising out of the application of the … statute under which the action has occurred." *Avery v. N.H. Dep't of Educ.*, 162 N.H. 604, 608 (2011). On the merits, where (as here) a court is faced with constitutional challenges to a statute, the question is whether—accepting all well-pleaded factual allegations in the complaint

as true—"a clear and substantial conflict exists between [the statute] and the constitution," *Am. Fed'n of Teachers v. State*, 167 N.H. 294, 300 (2015).

ARGUMENT

I. PLAINTIFFS HAVE ADEQUATELY ALLEGED STANDING

As to each claim in the complaint, each plaintiff has standing both as (1) an organization whose mission is undermined by S.B. 418, and (2) an association acting on behalf of its members and other supporters, including candidates. Another judge of this Court has recognized political-party standing on precisely these grounds. *See N.H. Democratic Party v. Gardner*, 2018 WL 5929044, at *2-3 (N.H. Super. Ct. Apr. 10, 2018) (Temple, J.). So has the U.S. Supreme Court. *See Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 189 n.7 (2008) (lead opinion). That Court was of course applying federal standing doctrine, but New Hampshire law "imposes standing requirements that are similar to those imposed by Article III of the Federal Constitution," *Duncan v. State*, 166 N.H. 630, 642 (2014). Defendants ignore these precedents, which defeat their primary argument (Mot. ¶20) that plaintiffs lack standing on the ground that neither the Democratic National Committee ("DNC") nor the New Hampshire Democratic Party ("NHDP") "is a 'person' … eligible to vote in New Hampshire."

Defendants fare no better attacking the factual allegations that support each plaintiff's organizational and associational standing. (To be clear, for each claim to go forward, there need be only one plaintiff with standing on that claim, and having either form of standing—organizational or associational—suffices.) As to organizational standing, plaintiffs allege that S.B. 418 "creates a significant risk that Democratic voters" will "choose not to vote," Compl. ¶15, which would undermine plaintiffs' "core goal" of "maximizing the number of votes for [Democratic] candidates," *id.* ¶13. Contrary to defendants' suggestion (Mot. ¶22), these allegations suffice at the pleading stage to show organizational standing, without the need to

identify any particular "voter who was 'deterred' from voting." As another judge of this Court explained (in recognizing the NHDP's standing to challenge S.B. 3), it is enough that plaintiffs "claim[] direct injury to [their] raison d'être—electing candidates who support the democratic platform," *N.H. Democratic Party*, 2018 WL 5929044, at *2. Likewise, a federal appellate court has recently explained that "[i]f an allegedly unlawful election regulation makes the competitive landscape worse for a … [political] party than it would otherwise be if the regulation were declared unlawful," that party "ha[s] the requisite concrete, non-generalized harm to confer standing." *Mecinas v. Hobbs*, 30 F.4th 890, 898 (9th Cir. 2022).

In further support of their organizational standing, plaintiffs allege that S.B. 418 "requires [them] to divert their time and resources toward educating voters about how to comply with the law and ensure the ballots they cast are actually counted"—diversion that plaintiffs allege "will leave the DNC and the NHDP with fewer resources for the core work that is essential to their mission." Compl. ¶14. Defendants respond (Mot. ¶23) that plaintiffs do not allege that S.B. 418 "has required" them to divert resources already, but only that they "will have to" do so. That response fails. In the S.B. 3 litigation just mentioned, the Court found standing based on a virtually identical allegation that plaintiffs "will have to" divert resources. *N.H. Democratic Party*, 2018 WL 5929044, at *3 (quotation marks omitted). Nor are plaintiffs' diversion-of-resources allegations, taken as true and drawing all reasonable inferences therefrom, overly "speculat[ive]." Defs. Mot. ¶23. The complaint alleges that plaintiffs' response to S.B. 418 "likely will cost at least tens of thousands of dollars and hundreds, if not thousands, of hours of work by DNC and NHDP employees." Compl. ¶14. In any event, as the Seventh Circuit explained—in another case in which a "new law injure[d] the Democratic Party by compelling the party to devote resources" to address the law—"[t]he fact that the added cost has not been

estimated and may be slight does not affect standing." *Crawford v. Marion Cnty. Election Bd.*, 472 F.3d 949, 951 (7th Cir. 2007), *aff'd*, 553 U.S. 181.

Each plaintiff likewise has associational standing to press each claim on behalf of its members and other constituents. Associational standing exists where an organization's "members would … have standing to sue in their own right, the interests at stake are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires the participation of individual members." *Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 181 (2000). Applying this standard, courts routinely hold that political parties have associational standing in cases like this. *See, e.g.*, *Crawford*, 472 F.3d at 951; *Sandusky Cnty. Democratic Party v. Blackwell*, 387 F.3d 565, 574 (6th Cir. 2004); *Democratic Party of Va. v. Brink*, 599 F.Supp.3d 346, 355-356 (E.D. Va. 2022). The same conclusion is warranted here, because plaintiffs allege that they each "stand in the shoes" of both (1) "members and constituents associated with the organizations" who "face harm in the form of potential disenfranchisement," and (2) "Democratic candidates whose chances of being elected are threatened." Compl. ¶16.

Defendants' responses lack merit. With respect to the second of these two allegations, moreover, the complaint identifies a candidate harmed by S.B. 418. *Id.* ¶61. Defendants have no response—a failing that alone suffices to reject their standing argument. And with respect to the first allegation, defendants protest (Mot. ¶21) that "no existing registered member of the New Hampshire Democratic Party could *ever* be subject to" S.B. 418, given that the law applies only to those not already registered to vote in New Hampshire. But that argument (which does not even apply to the DNC) ignores that the NHDP represents not just registered voters but also

people "who *would* vote for Democrats in New Hampshire" upon registering, or who are otherwise "associated with" plaintiffs. Compl. ¶¶13, 16 (emphasis added).

Defendants' other critique—that plaintiffs have not identified *specific individuals* affected by S.B. 418 (Mot. ¶22)—is likewise unavailing. In the recent S.B. 3 litigation, it was held sufficient for the NHDP to allege (1) that "the new registration provisions tend[ed] to suppress[] the vote of those who utilize same day registration"; (2) that "same-day registrants tend to be young, low-income, and racial minorities"; (3) "that these groups tend to vote Democratic and that long-term national trends in party affiliation show that Democrats hold a substantial advantage among young voters in particular"; and (4) that "New Hampshire precincts with the highest number of same day registrations tended to be [in] areas … [that] voted overwhelmingly for Democratic candidates." *N.H. Democratic Party*, 2018 WL 5929044, at *2 (quotation marks omitted). Plaintiffs make virtually identical allegations here. Compl. ¶¶25-26. According to public reporting, moreover, S.B. 418 has already resulted in the disposal of at least one vote for a Democratic mayoral candidate. *See* Bookman, *First Affidavit Ballot Was Cast in NH Last Month, and Then Was Pulled from Final Vote Tally*, New Hampshire Public Radio (Dec. 15, 2023).[9]

Finally, it bears noting that intervenors do not challenge plaintiffs' standing. To the contrary, they stated in their intervention motion (p.4) that their "rights in this case are identical to those of Plaintiffs," and that those rights are "sufficient to permit intervention" for the same reasons that "Plaintiffs allege that they have a legal right at stake sufficient to confer standing." Given that the Court permitted intervention, and for all the reasons just discussed, the Court

[9] https://www.nhpr.org/nh-news/2023-12-15/first-affidavit-ballot-was-cast-in-nh-last-month-and-then-was-pulled-from-final-vote-tally.

should hold that the complaint adequately alleges that at least one plaintiff has at least one form of standing as to each claim.

II. THE COMPLAINT STATES A VIABLE CLAIM THAT S.B. 418 VIOLATES ARTICLE 32 OF THE NEW HAMPSHIRE CONSTITUTION

Plaintiffs have easily stated a viable claim (and in fact have demonstrated in their preliminary-injunction motion a likelihood of success on the claim) that S.B. 418 violates "[t]he paramount law … by which town-clerks must be governed in performing their duties respecting elections," *Bell v. Pike*, 53 N.H. 473, 476 (1873). That "paramount law," "found in art[icle] 32 of the second part of the [state] constitution," *id*. at 477, imposes a deadline of "five days following [an] election" for local officials to report to the secretary of state a tally of the votes cast in their jurisdiction by persons "qualified to vote," N.H. Const. pt. 2, art. 32. The complaint adequately alleges that S.B. 418 makes it all but impossible to meet that deadline, by requiring local officials to wait until "the seventh day after [an] election" to determine which votes were cast by "unqualified voters," S.B. 418 §2, V-VI. As the complaint alleges (e.g., ¶¶67-71), this "clear and substantial conflict," *Am. Fed'n of Teachers*, 167 N.H. at 300, renders S.B. 418 unconstitutional.

Perhaps recognizing this, the motions to dismiss rebut an argument that plaintiffs do not make. Specifically, the motions assert that S.B. 418 does not conflict with article 32 because "Article 32 does not proscribe vote totals from being *adjusted* after" the five-day deadline, Defs. Mot. ¶3 (emphasis added), i.e., because "Article 32 does not mark the *end* of counting or adjudicating the validity of ballots in the state," Ints. Mot. 5 (emphasis added). But plaintiffs do not "argue that … Article 32 somehow prohibits vote totals from being adjusted for any reason after five days," Defs. Mot. ¶32, or that it "impos[es] a [five-day] time limit on local election officials to determine the winner of [a] contest," Ints. Mot. 6. What article 32 is (correctly)

alleged to require within five days is a completed tally of the votes cast by persons "qualified to vote." N.H. Const. pt. 2, art. 32, *cited in, e.g.*, Compl. ¶67. And, plaintiffs further allege (Compl. ¶68) that S.B. 418 renders compliance with that constitutional mandate all but impossible, by ensuring that election officials will not know which voters were "unqualified," S.B. 418 §2, V—or, by the same token, who was "qualified to vote," N.H. Const. pt. 2, art. 32—until at least "the seventh day after [an] election," S.B. 418 §2, V.

Indeed, the stated purpose of S.B. 418 is to establish a new regime to "prevent" "unqualified" votes from being cast in the first place, because the legislature deemed insufficient the prior regime in which election officials would "merely identif[y] when qualified votes have been cast" through "post-election investigation." S.B. 418 §1, II. In particular, on election day, affidavit-ballot voters are provided a verification letter "which lists all the documents required to *qualify to vote*." *Id*. §2, II(b) (emphasis added). Any such voter who fails to return the requisite verification letter "with the missing qualifying documentation" to the secretary of state within seven days is deemed to be "unqualified," *id*. §2, V. And local jurisdictions then "provide to the secretary of state a summary report, by race and ballot issue, of the total votes cast by the unqualified voters," *Id*. §2, VI, which are deducted from the final vote to be certified by the appropriate certifying authority. Defendants and intervenors cannot prevail by ignoring all this and instead attacking a claim the complaint does not advance.

As for the recount procedures cited by both defendants (Mot. ¶¶33-34) and intervenors (Mot. 6-7, 9-10), those simply underscore what is uniquely unconstitutional about S.B. 418. Unlike the affidavit-ballot verification process that S.B. 418 created, recounts in New Hampshire do not involve any assessment of voter qualifications. *See* RSA 660:1-6. In fact, any such assessment is impossible at the recount stage, because New Hampshire's ballot-anonymity

requirement, *see* RSA 656:16, means that individual voters (and thus their qualifications) are not identifiable during a recount. Thus, while recounts may result in an adjustment of the tally completed pursuant to article 32 (by double-checking that ballots were accurately tallied, *see* RSA 660:5), they do not prevent that tally of qualified votes from being timely completed in the first place. Indeed, recounts *depend* on the prompt completion of the tally article 32 requires, because the deadline for candidates to request a recount is "the Friday following the election," RSA 660:1, and whether an election qualifies for a recount (and the cost of any recount) depends on the margin between candidates as reflected in that tally, *see* RSA 660:1, 660:2; S.B. 418 delays that tally beyond the recount-request deadline.

The complaint further alleges (¶¶52-53) that S.B. 418 conflicts with pre-existing statutory laws that comply with article 32's five-day deadline for the completion of a tally of qualified votes. Contrary to intervenors' argument (Mot. 7), these conflicts are not "wholly irrelevant." They confirm that S.B. 418 throws a wrench into a state election apparatus that otherwise conforms to the "paramount law" of article 32, *Bell*, 53 N.H. at 476.

For instance, S.B. 418 conflicts with the requirement in RSA 659:63 that "[t]he counting of votes … shall not be adjourned nor postponed until it shall have been completed." Intervenors say (Mot. 8) there is no such conflict because, under S.B. 418, "affidavit ballots are counted along with other ballots" immediately "after polls have closed" on election day. But intervenors ignore that S.B. 418 expressly mandates a *subsequent* "counting of votes on affidavit ballots" (for purposes of deducting unqualified votes), separate and apart from the "counting" that occurs "on the day of the election." S.B. 418 §2, V. This subsequent "counting of votes" must occur before "[t]he counting of votes" is "completed." RSA 659:63. And because the subsequent "counting of votes … shall be conducted" no earlier than "the seventh day after the election,"

S.B. 418 §2, V, the new law necessarily entails an "adjourn[ment]" or "postpone[ment]" of the count, RSA 659:63.

S.B. 418 likewise conflicts with requirement in RSA 659:75 that local officials forward a "copy of the election return … to the secretary of state … no later than 8:00 a.m. on the day following a state election," unless the secretary specifies a different deadline. The "election return" referred to in that provision must reflect a "final count," RSA 659:70; *see also* RSA 658:71, of votes cast by "qualified voter[s]," RSA 659:12. But given S.B. 418's seven-day verification process for qualifying affidavit-ballot voters, S.B. 418 §2, V-VI, a return reflecting a final count cannot be returned by the morning after an election. Intervenors' argument that the "election return" referenced in RSA 659:75 "is by no means the final word on the election" (Mot. 9) attacks another strawman. As with article 32, what RSA 659:75 requires be promptly completed is a tally of the votes cast by "qualified voter[s]," RSA 659:12. In effect, then, the statute accelerates the deadline for a tally of votes cast by qualified voters from "within five days following the election, N.H. Const. pt. 2, art. 32, to "no later than 8:00 a.m. on the day following [the] election," RSA 659:75. For the same reason that it precludes compliance with article 32's deadline, S.B. 418 precludes compliance with RSA 659:75's even earlier deadline.

Finally, there is no merit to intervenors' argument (Mot. 4-5) that plaintiffs' article 32 claim fails because article 32 does not expressly "create an enforceable right—and certainly not one enforceable by private parties." Plaintiffs seek relief under the declaratory-judgment statute, see Compl. ¶19 (invoking RSA 491:22), which "has long been construed to permit challenges to the constitutionality of actions by [New Hampshire's] government or its branches," *Lorenz v. N.H. Adm'r Off. of the Cts.*, 152 N.H. 632, 635 (2005). Indeed, "[a] petition for declaratory judgment is 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." *Werme's Case*, 150 N.H. 351, 353 (2003). That principle certainly applies in election litigation; for example, the New Hampshire Supreme Court invoked the principle in *Levitt v. Maynard*, 104 N.H. 243 (1962), holding that a private plaintiff "proper[ly]" sought "a declaratory judgment that [New Hampshire's] apportionment of senatorial districts" was "unconstitutional," *id*. at 244. So too here: Plaintiffs properly invoke the declaratory-judgment statute to challenge the constitutionality of S.B. 418.

III. THE COMPLAINT STATES A VIABLE CLAIM THAT S.B. 418 VIOLATES THE NEW HAMPSHIRE CONSTITUTION'S PROCEDURAL-DUE-PROCESS GUARANTEE

Plaintiffs adequately allege that S.B. 418 also violates the New Hampshire Constitution's guarantee of procedural due process, N.H. Const. pt. 1, art. 15, by (1) adopting a verification process so onerous that it will often be difficult to complete it in the time provided, and (2) providing no notice or opportunity to be heard to people whose verification submissions are incomplete (and who are thus subject to referral for criminal prosecution). *See* Compl. ¶¶72-83. While the state has an interest in preventing ineligible people from voting, plaintiffs further allege, it has not demonstrated that (1) simplifying the affidavit-ballot verification process so that it can reasonably be completed in the time provided, and (2) notifying voters if their verification submissions are rejected would either allow voting by people who are ineligible or impose excessive administrative burdens. *See id.* ¶82.

Defendants' and intervenors' arguments that the complaint's allegations do not even state a viable due-process claim lack merit.

A. Defendants argue (Mot. ¶38) that plaintiffs have no protected due-process interest here because they do not themselves have the right to vote. That merely repeats their standing

argument, which fails because, as discussed, courts routinely hold that political parties can sue to protect their voters from disenfranchisement, *see supra* p.10.

Defendants' only other arguments (Mot. ¶¶39-48)—which intervenors echo (Mot. 14-17; PI Obj. 21-25)—are that prospective voters can avoid erroneous deprivation of their right to vote by (1) successfully completing the verification process or (2) registering before election day. Each argument is unavailing.

The former argument is no answer to a procedural-due-process challenge, the entire point of which is that the challenged requirements are too onerous or fail to give voters adequate notice when their verification submission is rejected. Indeed, if this point had merit, then a state could impose near-impossible requirements to registration (reciting the first 600 digits of pi, for example, or running a four-minute mile), and defend those as permissible on the ground that voters can always satisfy those requirements. That argument would quickly be rejected, and so too should the similar one made here.

As to the latter argument—that there is no procedural-due-process violation here because people can just register before election day—that too is wrong. New Hampshire has made the choice to give residents the right to register to vote on election day; having done so, it cannot deprive people of that right without constitutionally sufficient process, *see Goldberg v. Kelly*, 397 U.S. 254, 262-263 (1970); *see also Matter of Bourgeois*, 2018 WL 3968387, at *3 (N.H. July 3, 2018) ("We … rely on federal law … to aid in our analysis … of the [procedural] due process requirements of the State Constitution" because "[t]he Federal Constitution offers … no greater [procedural-due-process] protection than does the State Constitution."). And here too, the implications of the argument reveal its infirmity: Under defendants' and intervenors' view, a state could offer election-day registration only to, say, people of one race, gender, religion, or

political party, because people outside the preferred group(s) could just register before election day. That too would quickly be rejected.

Seemingly recognizing this problem, intervenors attempt to avoid it by conceding (Mot. 12; PI Obj. 19) that there are "*substantive* limits" on the legislature's authority to regulate election-day registration, "by for example limiting its availability to certain classes of people." Intervenors insist, however (Mot. 12-13; PI Obj. 19-20), that there are no *procedural* limits on the state's authority to regulate election-day registration. That is bizarre; the New Hampshire Constitution, like its federal counterpart, creates both substantive and procedural rights, and there is no basis to say that the legislature is free to ignore the procedural ones but not the substantive ones. And as noted, *Goldberg* specifically held that *procedural*-due-process requirements attach to the termination of a state-created statutory entitlement. *See* 397 U.S. at 263. Violating procedural rights, moreover, is often tantamount to (or an indirect way of accomplishing) a violation of substantive rights. Intervenors' argument proves the point: In their view, the state could shorten the verification period to one day, require ten forms of photo identification, or force affidavit voters to ride a unicycle to Concord to submit their verification materials. Such measures, and countless more that those seeking to suppress the vote could imagine, would undeniably disenfranchise voters, thus burdening the fundamental—and substantive—right to vote.

The out-of-state cases intervenors cite (Mot. 12-13; PI Obj. 19) do not prove that "procedural due process does not attach to statutory rights of this type." The first, *Richardson v. Texas Secretary of State*, 978 F.3d 220, 230-233 (5th Cir. 2020), held that even the right to vote—not just the right to election-day or mail-in voting—is not a protected liberty or property interest. This "outlier" case, which adopted "an extremely constricted view of liberty that does

not include voting rights," is "contrary to a large body of case law, which recognizes that the franchise is a fundamental right and the cornerstone of a citizen's liberty." *League of Women Voters of S.C. v. Andino*, 497 F.Supp.3d 59, 77 (D.S.C. 2020). And as another state appellate court recently noted, *Richardson* "do[es] not explain why voting deserves less protection than other state-created rights or constitutionally created liberty interests." *League of Women Voters of Kansas v. Schwab*, 63 Kan.App.2d 187, 216 (2023), *review granted* (June 23, 2023). Regardless, *Richardson*—which as a motions-panel decision is not binding precedent even in the Fifth Circuit, *e.g.*, *Cimino v. Raymark Indus., Inc.*, 151 F.3d 297, 311 n.26 (5th Cir. 1998)—is irrelevant here. As explained (Compl. ¶75), the right to a "free" election and the "equal right to vote" is expressly protected under the New Hampshire Constitution. Moreover, the New Hampshire Supreme Court has interpreted the state due process clause, N.H. Const. pt. 1, art. 15, to sweep more broadly than its federal counterpart; for example, it departed from the federal rule in holding that criminal defendants have a liberty interest in their reputations warranting protection under the state's due-process clause. *See State v. Veale*, 158 N.H. 632, 637 (2009). The other cases intervenors cite are even less relevant. *Correa-Ruiz v. Fortuno*, 573 F.3d 1, 14 (1st Cir. 2009) had nothing to do with voting rights; it rejected a federal due process challenge to a law lowering the mandatory retirement age. And the language intervenors cite is quoting *Gattis v. Gravett*, 806 F.2d 778, 780 (8th Cir. 1986), which expressly followed *Goldberg*, stating that "once created, a property interest cannot be deprived except pursuant to constitutionally adequate procedures." Likewise, *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972) was not about voting rights and expressly affirmed *Goldberg*; it merely held that "on the record before [it]," nonrenewal on a nontenured state teacher's contract did not deprive the teacher of any liberty or property interest, *id.* at 575.

B. The additional arguments that intervenors alone make likewise lack merit.

For example, intervenors contend (Mot. 10; PI Obj. 17) that a due-process challenge like plaintiffs' must be brought under the rubric of the constitutional test adopted in *Anderson v. Celebrezze*, 460 U.S. 780 (1983), and *Burdick v. Takushi*, 504 U.S. 428 (1992). But intervenors rely entirely on federal law, ignoring that New Hampshire Supreme Court precedent requires application of the test detailed in *Petition of Bagley*, 128 N.H. 275, 282-283 (1986)—which mirrors the federal due-process test articulated in *Mathews v. Eldridge*, 424 U.S. 319 (1976). In any event, even federal precedent does not support intervenors' argument, as multiple courts have considered procedural-due-process challenges to election regulations under *Mathews*. *See, e.g.*, *Saucedo v. Gardner*, 335 F.Supp.3d 202, 217 (D.N.H. 2018); *Zessar v. Helander*, 2006 WL 642646, at *6 (N.D. Ill. Mar. 13, 2006). Intervenors cite (Mot. 10; PI Obj. 17) three decisions favoring *Anderson-Burdick*, but at least one of those cases conceded that "[n]either *Anderson* nor *Burdick* … dealt with procedural due process claims," *Richardson*, 978 F.3d at 233-234.[10]

Likewise infirm is intervenors' argument (Mot. 11-14; PI Obj. 16, 18-21) that there is no constitutional right to election-day registration. Intervenors, that is, offer a "greater-includes-the-lesser argument," that because the legislature need not confer a particular right at all, it is free to confer the right in any way it chooses. But as explained, *see supra* pp.19-20, that argument is wrong. If the state chooses to create a right or interest (here, a right to election-day registration), then "it may not constitutionally authorize the deprivation of such an interest … without

[10] Plaintiffs' complaint would in any event state a claim under the *Anderson-Burdick* test, and plaintiffs would in fact likely succeed under that test: Eligible voters will be disenfranchised under S.B. 418—the most severe burden on the right to vote—and there is no evidence of pre-S.B. 418 fraud to justify that deprivation. *See supra* pp.6-8.

appropriate procedural safeguards." *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 541 (1985); *accord Goldberg*, 397 U.S. at 262-263.

These same points answer intervenors' contention (Mot. 18; PI Obj. 25) that the cure period is long enough to satisfy due process "because there is no procedural due process right to a cure period at all." As just explained, such greater-power-includes-the-lesser arguments fail; if a state chooses to create a right (here, to cure), then it must do so in compliance with constitutional mandates (including providing due process in connection with the exercise or denial of that right). *See Cleveland Bd. of Educ.*, 470 U.S. at 541; *Goldberg*, 397 U.S. at 262-263. The out-of-state cases intervenors cite about cure periods for ballot defects do not change that simple and dispositive point.

As to plaintiffs' allegation (Compl. ¶77) that part of the due-process problem is that people who lack any state-approved photo identification are unlikely to be able to obtain it *and* send it back within seven days, intervenors say (Mot. 15; PI Obj. 22) that "the affidavit letter comes with a blank voucher that can be used to secure identification without charge." But "charge" is not the issue (or at least not the entire issue); as just explained, the allegation is that seven days is not enough *time* to obtain the required identification and submit it, especially given that obtaining identification through this process requires considerable documentation—which itself will often take more time than S.B. 418 provides. *See* RSA 260:21 (describing requirements to obtain identification without charge). That intervenors apparently have nothing to say about all this confirms that plaintiffs have stated a viable due-process claim.

Next, intervenors argue (Mot. 15-16; PI Obj. 21-22) that voters do receive some kinds of notice, specifically, notice that photo identification is required to register on election day and (for those who show up without identification) notice of the verification process. That is irrelevant.

Plaintiffs' claim is that due process requires a particular *type* of notice—notice to affidavit voters that their verification submission has been rejected and their ballots are not going to be counted—and that S.B. 418 fails to provide *that* notice. *See* Compl. ¶78. Again, intervenors have nothing to say about the argument plaintiffs actually make. Likewise, intervenors' argument (Mot. 15; PI Obj. 21-22) that the requirements to bring photo identification or else submit verification documents somehow constitute "opportunities to be heard" does not answer plaintiffs' point that voters constitutionally must have, and under S.B. 418 do not have, an opportunity to be heard *on a particular point*: why their verification submissions should have been accepted. Compl. ¶78. As to that argument, intervenors—once more—have nothing to say.

Instead, intervenors assert (Mot. 16; PI Obj. 23) that plaintiffs' allegations are conclusory, that "the Complaint contains not a single factual allegation establishing that [S]B 418 burdens any person or risks depriving any person of any alleged right." That assertion is hard to take seriously, because the complaint is replete with precisely such factual allegations (which as noted must be taken as true in this posture). For example, the complaint alleges in paragraph 55 that because of S.B. 418, "New Hampshire residents who lack or simply forget to bring qualifying documentation to the polls will no longer be able to attest to their qualifications, and instead will have to follow a difficult and confusing process" in order to have their vote counted. That is (to again quote page 16 of intervenors' motion) a "factual allegation establishing that [S]B 418 [both] burdens any person"—the burden of having to follow the difficult and confusing process in order to have one's vote counted—*and* "risks depriving any person of any alleged right," namely the fundamental right to vote and have one's vote counted, which will be denied absent completion of the difficult and confusing affidavit-ballot verification process. Similarly, paragraph 56 alleges that affidavit-ballot "[v]oters who are unable to obtain

and send the documentation within that [seven-day] window, or who simply forget or misplace the verification letter will have no recourse; their ballots will be omitted from the final election tally." That too is a "factual allegation establishing that [S]B 418 … risks depriving any person of any alleged right" (Ints. Mot. 16; PI Obj. 23)—again, the right to vote and have one's vote counted, a right at risk of being denied because of S.B. 418's verification process. And if one just wants to keep going through the complaint paragraph by paragraph, paragraph 57 alleges that "affidavit-ballot voters who do not successfully complete the verification process are referred to the attorney general for investigation and possibly criminal prosecution." That is yet another "factual allegation establishing that [S]B 418 burdens any person," Ints. Mot. 16, PI Obj. 23, namely any person subjected to such investigation and possible prosecution—which is unquestionably a burden.

Turning a blind eye to all this (and so much more like it throughout the complaint), intervenors gripe (Mot. 16; PI Obj. 23) that the complaint does not include details like the precise "number of same-day registrants who show up without any identification." But they cite no authority for the proposition that that information (or anything else they say is missing) is required. Their failure to do so is unsurprising, as the New Hampshire Supreme Court has repeatedly explained that "'New Hampshire is a notice pleading jurisdiction, and, as such, we take a liberal approach to the technical requirements of pleadings.'" *Toy v. City of Rochester*, 172 N.H. 443, 448 (2019) (quoting *City of Keene v. Cleaveland*, 167 N.H. 731, 743 (2015)). Accordingly—as the court has also repeatedly explained—a "complaint 'need not do more than state the general character of the action and put both court and counsel on notice of the nature of the controversy.'" *Id.* (quoting *Pike Indus. v. Hiltz Constr.*, 143 N.H. 1, 4 (1998)). The

complaint here surpasses this "liberal" standard (*id.*) by a country mile. Again, intervenors offer no contrary authority.

Intervenors also suggest that plaintiffs' due-process claim is inconsistent with their article 32 claim; in intervenors' words (Mot. 18; PI Obj. 26), plaintiffs claim that S.B. 418's verification process for affidavit-ballot voters is "both too short to satisfy" due process "and too long under Article 32." But the fact that a statute violates two constitutional commands is assuredly not a reason to uphold it. What those two commands mean is that the legislature cannot adopt election regulations so onerous that complying with them could not be required—consistent with due process—before article 32's deadline. Contrary to intervenors' suggestion (Mot. 18-19; PI Obj. 26), that does not mean that the state could *never* impose a photo-identification requirement. The state simply must ensure that any such requirement (or other election-related requirement) does not (1) defer voter-qualification determinations until after article 32's deadline, or (2) without due process, deprive voters of their fundamental right to cast a vote that will be counted. Again, intervenors do not explain why a statute's double constitutional infirmity provides any basis to sustain it.

Finally, intervenors contend (Mot. 19-21; PI Obj. 28-30) that the provision of S.B. 418 requiring the referral of voters who do not successfully complete the verification process for investigation and possible criminal penalties does not violate due process because "the mere fact that a law carries unwanted criminal penalties does not state a claim for a violation of the due process clause." But that is not all plaintiffs allege; the complaint also alleges (¶¶54-57, 77-81) that such referrals can deter voting by qualified residents who have no desire to be burdened with intrusive government scrutiny. About that allegation, intervenors (yet again) have nothing to say—likely because deterring people from exercising their fundamental right to vote by

threatening them with unjustified investigation and criminal prosecution violates due process. Intervenors also quibble (Mot. 20; PI Obj. 28) that voters referred for possible prosecution suffer no stigmatization because there is no "list of allegedly fraudulent voters," only a list of voters who did not successfully complete the verification process. But the nomenclature is irrelevant; what matters is that the statute authorizes the creation of the list for the purpose of investigating possible fraud.

CONCLUSION

The motions to dismiss should be denied.

February 20, 2024

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CERTIFICATE OF SERVICE

A copy of the foregoing was transmitted today by electronic filing to all counsel of record.

February 20, 2024

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