

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

OBJECTION TO PLAINTIFFS/APPELLANTS'
MOTION FOR EXPEDITED APPEAL

NOW COME Intervenor Republican National Committee and New Hampshire
Republican State Committee, by and through counsel, and hereby OBJECT to
Plaintiffs/Appellants' Motion for Expedited Briefing, and in support thereof states as
follows:

1. Plaintiffs/Appellants ask this Court to order the parties to engage in a highly
expedited briefing to resolve novel questions of constitutional law that are both unique to
New Hampshire and that have never before been presented to New Hampshire courts.
Indeed, no court in this state has ever concluded that Article 32 of the New Hampshire
Constitution confers rights on private parties like Plaintiffs/Appellants, let alone construed it
in the manner they have urged upon the courts.

2. There is no justification for fast-tracking this case. Plaintiffs/Appellants' assertion that this case needs to be resolved before the primary election on September 10 or general election on November 5 does not withstand even mild scrutiny.

3. First, Plaintiffs/Appellants sat on their rights for a *year and a half* after the enactment of SB 418 before filing this facial challenge to its constitutionality.

4. Second, at no time in the court below did they seek expedited consideration of any sort.

5. Third, while Plaintiffs/Appellants were standing idly by, this state conducted numerous elections in accordance with the provisions of SB 418, and nothing in the record (or otherwise, for that matter) suggests that any harm whatsoever arose from doing so.

6. Ignoring these inconvenient facts, Plaintiffs/Appellants nevertheless assert that this Court must expedite the case so it can be resolved before the upcoming elections. Nowhere, however, do they even try to explain why the Court should be especially concerned about SB 418's application to these elections. After all, the rights purportedly at stake today were just as much at stake during last year's elections, which Plaintiffs/Appellants let pass without a peep.

7. But even if there were reason to believe that elections in presidential years should trigger special legal rules, the fact remains that the present situation is entirely the product of Plaintiffs/Appellants' own choices. If there is no time for the Court to resolve this case in the ordinary course, it is only because of Plaintiffs/Appellants' own failure to zealously pursue their purported rights. The mere fact that this case involves "election law" is not a sufficient reason to relieve Plaintiffs/Appellants from the consequences of their own choices by granting them special permission to jump the line in front of other litigants who have been far more zealous in pursuit of their legal rights.

8. Plaintiffs/Appellants present a claim that is dubious on its face. New Hampshire has already conducted several elections in accordance with SB 418, the law they assert somehow violates Article 32 of the New Hampshire Constitution, a provision that has *never* been held to confer rights on any private party and that has never been construed in the manner Plaintiffs/Appellants urge upon this Court.

9. Finally, Plaintiffs/Appellants ask this Court to impose an expedited appeal schedule that will cause substantial disruptions to Intervenors' other activities throughout New Hampshire and throughout the Nation solely because they chose to delay bringing their claims forward for 18 months. It is fundamentally unfair to ask the Intervenors to adjust their schedules and operate under significant time constraints to accommodate circumstances that Plaintiffs/Appellants themselves created and could easily have avoided.

10. The Court should deny the motion for expedited briefing.

Facts

11. Governor Sununu signed SB 418 into law on June 17, 2022. By its terms, SB 418 took effect on January 1, 2023.

12. The same day that SB 418 received the Governor's signature, 603 Forward, Open Democracy Action, Louise Spencer, Edward R. Freidrich, and Jordan M. Thompson (collectively "the 603 Forward plaintiffs") filed suit against the Secretary of State and Attorney General (collectively "the State defendants"), seeking to enjoin its enforcement.

13. The following business day, June 21, 2022, Manuel Espitia, Jr. and Daniel Weeks (collectively "the Espitia plaintiffs") likewise filed suit against the State defendants.

14. The Hillsborough County Superior Court – Southern District (Temple, J.) dismissed both complaints for lack of standing by Order with a clerk's notice dated November 3, 2023.

15. The Espitia plaintiffs filed their Notice of Appeal with this Court on December 4, 2023, and the Court scheduled briefing in the ordinary course. The 603 Forward plaintiffs did not appeal.

16. Plaintiffs/Appellants in this case did not file their superior court action until December 22, 2023. In other words, they waited to file not only until after the 603 Forward and Espitia complaints had been dismissed, but also until after the 603 Forward plaintiffs allowed their appeal period to expire without taking any action.

17. The parties in the *Espitia* case have not seen the need to seek special, expedited treatment in either the superior court or in this Court. To the contrary, the briefing schedule has allowed the Espitia plaintiffs to seek extensions twice and the State defendants and Intervenors to seek an extension once. These extensions have enabled the production of high-quality briefs with careful and well-developed arguments that should aid this Court in reaching a well-considered decision resolving the important issues presented therein and clarifying important aspects of the law in this state.

Argument

18. Plaintiffs/Appellants urge this Court to expedite this appeal in the hope that a decision can be released in time to be effective at the state primary on September 10 and state general election on November 5.

19. They make this request despite the fact that the temporal proximity of the appeal to the election is *entirely* because of litigation choices they have made and over which they have had full control.

20. Plaintiffs/Appellants make no effort whatsoever to justify their delay in filing their case. And the fact that the 603 Forward plaintiffs and the Espitia plaintiffs were able to file timely complaints underscores the fact that the delay was entirely of their own choosing.

21. Indeed, the *603 Forward* and *Espitia* litigation demonstrates just how much time Plaintiffs/Appellants chose to waste. That case has involved substantial litigation, including an appeal to this Court that was resolved by agreement, filings addressing a specific question raised *sua sponte* by the trial court, full litigation of the motion to dismiss filed by the State defendants, and the ongoing appeal to this Court. Clearly, had the Plaintiffs/Appellants timely brought forward their claims, there would have been ample time to address them in the ordinary course.

22. Instead, Plaintiffs/Appellants waited 18 months to bring their case forward.

23. Worse still, Plaintiffs/Appellants chose to bring forward a novel claim that SB 418 violates voters' state procedural due process rights – a claim to that point unheard of in New Hampshire law. Despite the trial court's incorrect conclusion that this claim could proceed to discovery, Plaintiffs/Appellants abruptly non-suited it and exacted it from their case. Plaintiffs/Appellants' decision to pursue this novel claim undoubtedly slowed the trial court litigation and almost certainly delayed the trial court's issuance of its order. Indeed, the trial court's order concerning the procedural due process claim is substantially longer and more involved than the portion of the order addressing the Part II, Article 32 claim.

24. On top of all this, Plaintiffs/Appellants proposed schedule has substantial potential to prejudice Intervenor's ability to fully and adequately brief the subject of the appeal.

25. First, as discussed, the case presents novel questions of first impression.

26. Second, Plaintiffs/Appellants propose to afford Intervenors only twenty days to file their responsive brief. This is roughly one-third less time than was afforded in the *Espitia* appeal. Plaintiffs/Appellants' proposal would eliminate Intervenors' ability to exercise their right to an automatic extension of up to fifteen days under Sup. Ct. R. 21 (6-a). And the proposal would also deprive Intervenors of their ability to move this Court for leave to file a sur-reply pursuant to Sup. Ct. R. 13A should that become necessary. And given the novelty of the Plaintiffs/Appellants' claim, there is a very strong possibility that a sur-reply would be necessary and appropriate. There is no justification in law or equity to force Intervenors to set aside their schedules and rush their efforts—perhaps jeopardizing their rights in this case and elsewhere—because Plaintiffs/Appellants chose to wait more than a year and a half to file their case.

27. Finally, undersigned counsel serves as legal counsel to the New Hampshire Senate. Pursuant to the rules adopted by the Senate, Thursday May 23 is last day for the Senate to act on bills passed by the House of Representatives. The proposed schedule thus asks Intervenors' counsel to be taken away from these responsibilities to brief this case on the expedited schedule solely because Plaintiffs/Appellants were dilatory in filing their case.

Conclusion

28. Plaintiffs/Appellants ask this Court to impose an expedited appeal schedule on the other parties due entirely to their own failure to bring their case in a timely manner. And they offer no explanation for the delay. For the foregoing reasons, the Court should deny Plaintiffs/Appellants' request for an expedited appeal.

Respectfully Submitted,

REPUBLICAN NATIONAL COMMITTEE
and NEW HAMPSHIRE REPUBLICAN
STATE COMMITTEE

By their attorneys,
Lehmann Major List, PLLC

May 3, 2024 */s/ Richard J. Lehmann*

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CERTIFICATION

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

May 3, 2024 */s/ Richard J. Lehmann*

Richard J. Lehmann

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