THE STATE OF NEW HAMPSHIRE
SUPREME COURT

Docket No. 2024-0247

Democratic National Committee & a.

v.

New Hampshire Secretary of State & a.

SUPPLEMENTAL MEMORANDUM FOR THE NEW HAMPSHIRE SECRETARY OF STATE

THE NEW HAMPSHIRE SECRETARY OF STATE

By his Attorneys,

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INTRODUCTION

The Plaintiffs, the Democratic National Committee ("DNC") and the New Hampshire Democratic Party ("NHDP"), seek a declaratory judgment against the New Hampshire Secretary of State and the New Hampshire Attorney General (collectively, the "State"), ruling that Laws 2022, Chapter 239 ("SB 418") violates Part II, Article 32 of the State Constitution. The Superior Court (*Ignatius*, J.) ruled that the Plaintiffs had standing, but dismissed the Plaintiffs' Part II, Article 32 claim for failure to state a claim.

The Plaintiffs appealed the trial court's dismissal for failure to state a claim and the trial court's denial of the Plaintiffs' request for a preliminary injunction. The State cross appealed the trial court's ruling that the Plaintiffs had standing.

The Parties finished briefing this matter on August 16, 2024. Oral argument is scheduled for October 10, 2024.

On September 27, 2024, this Court ordered the parties to submit brief memoranda to answer two questions: (1) "Does the principle set forth in *Purcell v. Gonzalez*, 549 U.S. 1, 4-6 (2006), . . . militate against our issuance of a decision in this appeal prior to November 6, 2024?"; and (2) "Does the recent enactment of HB 1569 (Laws 2024, chapter 378), which repeals statutory provisions at issue in this case, render the appeal moot as of November 11, 2024?"

Regarding *Purcell*, there are three questions on appeal: (1) do the Plaintiffs have standing to seek declaratory judgment; (2) did the trial court properly dismiss the Plaintiffs' Part II, Article 32 claim for failure to state a

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claim; and (3) did the trial court properly deny the Plaintiffs' request for a preliminary injunction. Ruling on the first two issues will not alter any election procedure prior to the November 5, 2024 State General Election. If the Court rules in the Plaintiffs' favor on both issues, this matter will need to be remanded for further proceedings, but remand will not itself alter any election procedure. However, if the Court reverses the trial court ruling on the third issue and remands with instructions for the trial court to preliminarily enjoin the State from enforcing SB 418, that would alter election procedures on the eve of an election. Thus, the *Purcell* principle militates against this Court ruling in the Plaintiffs' favor on the third issue prior to the November 5, 2024 State General Election.

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Regarding mootness, if HB 1569 goes into effect on November 11, 2024, then the ultimate merits issue in this case (the constitutionality of SB 418) will be moot. The State requests that this Court exercise its discretion not to dismiss this matter as moot for two primary reasons. *See Appeal of Hinsdale Fed'n of Teachers*, 133 N.H. 272, 276 (1990) (reasoning that "the question of mootness is one of convenience and discretion and is not subject to hard-and-fast rules").

First, in less than three weeks since being signed into law, HB 1569 is already the subject of two federal court challenges that seek to enjoin the law. If the federal court issues a preliminary injunction before November 11, 2024, enjoining enforcement of HB 1569, then SB 418's affidavit ballot procedure will remain in effect and the merits of this appeal will not be moot. Even if the federal court does not issue a preliminary injunction before November 11, 2024, the federal court may issue an injunction at any

time prior to March of 2025—the date of the next election for which HB 1569 is scheduled to be in effect.

Second, one of the issues on appeal relates to an organization's standing to seek a declaratory judgment under RSA 491:22 regarding the meaning of an election statute. This is an issue of public interest that is relevant to other challenges to election procedure statutes—not just the Plaintiffs' present challenge of SB 418's affidavit ballot procedure. Moreover, the issue of standing for organizations to challenge election procedure statutes under RSA 491:22 is capable of repetition yet evading review due to temporal restrictions on election procedure challenges. A challenge that is brought too far ahead of an election raises ripeness concerns; a challenge that is brought too close to an election raises *Purcell* concerns; a plaintiff's personal injury may be mooted by an election taking place; and election procedures are amended fairly frequently, which also raises mootness concerns. For these reasons, even if HB 1569 is not enjoined before November 11, 2024, the State requests that this Court exercise its discretion not to dismiss this appeal for mootness.

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BACKGROUND

On December 22, 2023, the Plaintiffs filed the underlying complaint, seeking a declaration under RSA 491:22 that SB 418 violates Part II, Article 32 of the State Constitution. SB 418 requires residents who are registering to vote for the first time in New Hampshire on election day and without documentary proof of identity to vote by affidavit ballot pursuant to RSA 659:23-a.

On April 16, 2024, the trial court issued an order: (1) ruling that the Plaintiffs had standing to seek a declaratory judgment under RSA 491:22; (2) dismissing the Plaintiffs' Part II, Article 32 claim for failure to state a claim; and (3) denying the Plaintiffs' request for a preliminary injunction.

The Plaintiffs appealed the trial court's dismissal of their Part II, Article 32 claim and the trial court's denial of preliminary injunction. The State cross-appealed the trial court's ruling that the Plaintiffs had standing to pursue a declaratory judgment under RSA 491:22.

On September 12, 2024, the Governor signed Laws 2024, Chapter 378 ("HB 1569") into law. HB 1569 eliminates statutory provisions that currently allow a New Hampshire resident who is registering to vote to complete an affidavit to prove their qualifications to vote (identity, age, citizenship, or domicile). In other words, a person registering to vote must present documentary proof of identity, age, citizenship, and domicile, without exception. HB 1569 additionally requires every person seeking to vote on election day to present documentary proof of identity. HB 1569 additionally eliminates the affidavit ballot process created by SB 418.

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Two lawsuits have already been filed seeking to enjoin the State from enforcing HB 1569. On September 17, 2024, plaintiff New Hampshire Youth Movement filed a complaint in the United States District Court for the District of New Hampshire (Docket No. 1:23-cv-00291). New Hampshire Youth Movement challenges the constitutionality of HB 1569 and seeks to permanently enjoin the State from enforcing portions of HB 1569. On September 30, 2024, plaintiffs Coalition for Open Democracy, League of Women Voters of New Hampshire, The Forward Foundation, and five individuals (collectively "Coalition for Open Democracy") filed a complaint in the United States District Court for the District of New Hampshire (Docket No. 1:24-cv-00312). Coalition for Open Democracy challenges the constitutionality of HB 1569 and seeks preliminary and permanent injunctive relief prohibiting the State from enforcing HB 1569.

HB 1569 goes into effect on November 11, 2024 (*i.e.*, 60 days after passage). Thus, SB 418's affidavit ballot procedure will be in place for the November 5, 2024 State General Election. However, SB 418's affidavit ballot procedure will not be in place for the March town elections unless the District of New Hampshire enjoins enforcement of HB 1569 prior to March.

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ARGUMENT

I. THE PURCELL PRINCIPLE DOES NOT MILITATE AGAINST THIS COURT ISSUING A DECISION PRIOR TO NOVEMBER 6, 2024

The first question that this Court ordered the parties to address is: "Does the principle set forth in *Purcell v. Gonzalez*, 549 U.S. 1, 4-6 (2006), . . . militate against our issuance of a decision in this appeal prior to November 6, 2024?"

Answer: Yes, the *Purcell* principle does militate against this Court issuing an order reversing the trial court's denial of the Plaintiffs' request for preliminary injunctive relief because doing so would alter election rules prior to the November 5, 2024 State General Election. However, the *Purcell* principle does not militate against this Court issuing an order on: (1) the issue of whether the Plaintiffs have standing to seek a declaratory judgment under RSA 491:22; and (2) the issue of whether the trial court properly dismissed the Plaintiffs' Part II, Article 32 claim for failure to state a claim.

"Court orders affecting elections, especially conflicting orders, can themselves result in voter confusion and consequent incentive to remain away from the polls." *Purcell v. Gonzalez*, 549 U.S. 1, 4-5 (2006). Because of the risk of voter confusion and suppression of voter turnout, the United States Supreme Court "has repeatedly emphasized that lower federal courts should ordinarily not alter the election rules on the eve of an election." *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S.Ct. 1205, 1207 (2020).

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There are three questions on appeal: (1) do the Plaintiffs have standing to seek declaratory judgment; (2) did the trial court properly dismiss the Plaintiffs' Part II, Article 32 claim for failure to state a claim; and (3) did the trial court properly deny the Plaintiffs' request for a preliminary injunction.

Only the third question implicates the *Purcell* principle. If the Court reverses the trial court's denial of preliminary injunctive relief (which necessarily means ruling in the Plaintiffs' favor on the other two questions) and remands with the order would instructions for the trial court to preliminarily enjoin the State from enforcing SB 418, that would alter election procedures on the eve of an election. Changing election procedure rules just weeks before the November 5, 2024 State General Election creates a risk of voter and election official confusion. Doing so also creates a risk that election officials across the state will inconsistently apply SB 418's affidavit ballot procedures. Therefore, the *Purcell* principle militates against this Court ruling in the Plaintiffs' favor on the third question prior to the November 5, 2024 State General Election. *See*, *e.g.*, *Purcell*, 549 U.S. at 4-6 (vacating an order issued just weeks before an election that enjoined a state's voter identification procedures); *Republican Nat. Comm. v. Democratic Nat. Comm.*, 140 S. Ct. 1205, 1206-07 (2020) (per curiam) (stating a court order issued five days before an election that enjoined a state law requiring absentee ballots to be returned no later than election day).

However, the first and second questions do not implicate the *Purcell* principle. The Court decision on the Plaintiffs' standing to seek a declaratory judgment under RSA 491:22 will not itself alter any election

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procedure prior to the November 5, 2024 State General Election. Similarly, the Court's decision on whether the trial court properly dismissed the Plaintiffs' Part II, Article 32 claim for failure to state a claim will not itself alter any election procedure prior to that election.

If this Court rules that the Plaintiffs have standing and reverses the trial court's dismissal for failure to state a claim, this matter will be remanded to the trial court for further proceedings. However, an order remanding this matter for further proceedings will not itself alter any election procedure prior to the November 5, 2024 State General Election.

II. THE ISSUES ON APPEAL SHOULD NOT BE DISMISSED UNDER THE DISCRETIONARY MOOTNESS DOCTRINE

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The second question that this Court ordered the parties to address is: "Does the recent enactment of HB 1569 (Laws 2024, chapter 378), which repeals the statutory provisions at issue in this case, render the appeal moot as of November 11, 2024?"

Answer: Although HB 1569 may moot the ultimate merits of this case if the law is not enjoined before November 11, 2024, this Court should exercise its discretion not to dismiss this appeal as moot because: (1) multiple lawsuits have already been filed seeking to enjoin the State from enforcing HB 1569; and (2) one of the issues on appeal concerns the standing of organizations to seek a declaratory judgment under RSA 491:22 to challenge election procedure statutes, which the Court should address notwithstanding any mootness concerns because it is an issue of public interest that would be relevant to other election procedure challenges, and because the issue is capable of repetition yet evading review due to temporal restrictions on election procedure challenges.

Generally, a "a matter is moot when it no longer presents a justiciable controversy because issues involved have become academic or dead." *Appeal of Hinsdale Fed'n of Teachers*, 133 N.H. at 276 (quotation omitted). However, "the question of mootness is one of convenience and discretion and is not subject to hard-and-fast rules." *Id*. (quotation omitted). For example, a court should decline to dismiss a matter on mootness grounds if there is a pressing public interest that favors deciding the issue. *See id*. Similarly, a court should decline to dismiss a matter on mootness grounds if the question is "capable of repetition yet evading review." *Id*. (quotation omitted).

A. The Plaintiffs' lawsuit is not "academic or dead" because HB 1569 may be enjoined before it goes into effect or before the next scheduled election.

HB 1569 goes into effect on November 11, 2024. If HB 1569 goes into effect as intended, the ultimate merits of the Plaintiffs' complaint will be moot because SB 418's affidavit ballot procedures will have been repealed.

However, HB 1569 is already the subject of two federal lawsuits that seek to enjoin the State from enforcing the law. The plaintiffs in each case seek permanent injunctive relief, and the plaintiffs in the Coalition for Open Democracy lawsuit have already requested preliminary injunctive relief enjoining the State from enforcing HB 1569. If the State is preliminarily or permanently enjoined from enforcing HB 1569, then the voting procedures that HB 1569 repealed (including SB 418's affidavit ballot procedures) would remain in effect.

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Therefore, HB 1569 may not go into effect on November 11, 2024. And even if HB 1569 goes into effect on November 11, 2024, there is a possibility that SB 418 will still be in effect at the time of the next scheduled elections in March of 2025.

This Court should therefore exercise its discretion not to dismiss this matter on mootness grounds.

B. This Court should exercise its discretion to rule on the appellate issues in this case even if the ultimate merits of the Plaintiffs' complaint are mooted by SB 418 being repealed.

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One of the issues on appeal relates to standing for organizations to seek a declaratory judgment under RSA 491:22 to challenge election procedure statutes. Although the merits of the Plaintiffs' underlying claim may be mooted if HB 1569 goes into effect and if the State is not enjoined from enforcing HB 1569, this Court should nevertheless address the issue on appeal for two reasons.

First, the scope of when an organization has standing under RSA 491:22 to seek a declaratory judgment challenging election procedures is an important issue of public interest. The State and the public have a strong interest in knowing the contours of standing under RSA 491:22 to challenge election procedure statutes because election cases are important, frequently occur in compressed or expedited timelines, can be complex, and therefore consume a significant amount of time and resources of the trial courts and the parties.

Second, the issue of standing under RSA 491:22 to challenge election procedure statutes is capable of repetition yet evading review due to temporal restrictions on election procedure challenges.

Election statutes are frequently the subject of court challenges, including by organizational plaintiffs. For example, HB 1569 is already the subject of two federal-court lawsuits[1] with organizational plaintiffs, and SB 418 was also the subject of two state-court lawsuits with organizational plaintiffs.

Even though election statutes are frequently challenged in court, it is difficult to bring a challenge and litigate it to conclusion without the case becoming moot. State primary elections and general elections are held every two years. Town elections occur every year, and city elections typically occur every two years. Thus, a plaintiff seeking to get an order enjoining enforcement of an election procedure statute prior to an election has a narrow window to bring a challenge and litigate it to conclusion. A challenge that is brought too far ahead of an election may raise ripeness concerns. A challenge that is brought too close to an election may raise *Purcell* concerns. And a complaint for injunctive relief prior to an election may be mooted by the election taking place.

For these reasons, even if HB 1569 is not enjoined before November 11, 2024, the State requests that this Court exercise its discretion not to dismiss this appeal for mootness.

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[1] Although the federal challenges do not implicate standing to seek a declaratory judgment under RSA 491:22, these cases still involve challenges to New Hampshire election statutes that could have been brought in a New Hampshire court. An opinion from this Court addressing the scope of standing to seek a declaratory judgment under RSA 491:22 will help inform organizations seeking to challenge a New Hampshire election statute as to whether the challenge could be brought in state court.

CONCLUSION

The parties and the court system have expended substantial resources litigating this case at the trial court and on appeal. It does not make sense to dismiss this case for mootness based on HB 1569 going into effect, particularly because HB 1569 is already the subject of two court challenges. It would be a significant waste of judicial and party resources if this Court were to dismiss this appeal for mootness because SB 418 is repealed, only to have the federal court enjoin enforcement of HB 1569, thereby putting SB 418 back into effect. Mootness is not subject to "hard-and-fast rules," and this is a perfect example of a situation in which this Court should exercise its discretion not to dismiss this appeal for mootness.

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Respectfully Submitted,

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Date: October 3, 2024

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CERTIFICATE OF COMPLIANCE

I, Brendan A. O'Donnell, hereby certify that this supplemental memorandum contains fewer than 4,500 words, which is the word limit that the Court's September 27, 2024 Order prescribed for this supplemental memorandum.

Date: October 3, 2024 /s/ *Brendan A. O'Donnell*
Brendan A. O'Donnell

CERTIFICATE OF SERVICE

I hereby certify that a copy of the State's brief was sent through the Court's electronic filing system to all parties of record:

Date: October 3, 2024 /s/ *Brendan A. O'Donnell*
Brendan A. O'Donnell

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