

THE STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS.
SOUTHERN DISTRICT

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.

PLAINTIFFS' AMENDED MOTION FOR PRELIMINARY INJUNCTION

Pursuant to New Hampshire Superior Court Rule 48(b), Plaintiffs the Democratic National Committee and the New Hampshire Democratic Party move for an order preliminarily enjoining the enforcement of New Hampshire Senate Bill ("S.B.") 418. As explained in the accompanying memorandum, S.B. 418 violates (1) the New Hampshire Constitution's requirement that city and town clerks report the results of an election to the secretary of state within five days of the election, N.H. Const. pt. 2, art. 32, by precluding a final vote count until at least "the seventh day after the election," S.B. 418 §2, V, and (2) the state constitution's due-process guarantee, N.H. Const. pt. 1, art. 15, by giving certain same-day registrants insufficient time, notice, and opportunity to cure to ensure that their votes are counted and that they are not criminally prosecuted. Absent an injunction, plaintiffs will suffer irreparable harm for which there is no adequate remedy at law.

Dated: December 22, 2023

Respectfully submitted,

/s/ William E. Christie

William E. Christie, #11255
Shaheen & Gordon, P.A.
107 Storrs Street
Concord, N.H. 03302
(603) 225-7262
wchristie@shaheengordon.com

Seth P. Waxman*
Daniel S. Volchok*
Christopher E. Babbitt*
Joseph M. Meyer*
Jane E. Kessner*
Nitisha Baronia*
Wilmer Cutler Pickering Hale and Dorr LLP
2100 Pennsylvania Avenue N.W.
Washington, D.C. 20037
(202) 663-6000 (telephone)
(202) 663-6363 (fax)
seth.waxman@wilmerhale.com
daniel.volchok@wilmerhale.com
christopher.babbitt@wilmerhale.com
joseph.meyer@wilmerhale.com
jane.kessner@wilmerhale.com
nitisha.baronia@wilmerhale.com

**Pro hac vice applications
forthcoming*

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was transmitted by electronic filing to all counsel of record.

Dated: December 22, 2023

Respectfully submitted,

/s/ William E. Christie
William E. Christie, #11255

RETRIEVED FROM DEMOCRACYDOCKET.COM

THE STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS.
SOUTHERN DISTRICT

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.

**MEMORANDUM OF LAW IN SUPPORT OF
MOTION FOR PRELIMINARY INJUNCTION**

RETRIEVED FROM DEMOCRACYDOCKET.COM

TABLE OF CONTENTS

INTRODUCTION 1

BACKGROUND 2

 A. S.B. 418 Overhauled New Hampshire’s Rules For Same-Day Registration
 And Voting..... 2

 B. S.B. 418 Was Enacted Despite The Nonexistence Of Voter Fraud In New
 Hampshire 5

 C. S.B. 418 Was Enacted Despite Serious Doubts About Its Constitutionality 7

LEGAL STANDARD..... 8

ARGUMENT 9

 I. PLAINTIFFS ARE LIKELY TO SUCCEED WITH THEIR CLAIMS THAT S.B. 418
 VIOLATES THE NEW HAMPSHIRE CONSTITUTION 9

 A. Return-Of-Votes Clause..... 9

 B. Procedural Due Process 10

 II. PLAINTIFFS FACE AN IMMEDIATE THREAT OF IRREPARABLE HARM FOR
 WHICH THEY HAVE NO ADEQUATE REMEDY AT LAW..... 14

 III. PRINCIPLES OF EQUITY FAVOR AN INJUNCTION 16

CONCLUSION..... 18

RETRIEVED FROM DEMOCRACYDOCKET.COM

TABLE OF AUTHORITIES

CASES	Page(s)
<i>603 Forward v. Scanlan</i> , 2023 WL 7326368 (N.H. Super. Ct. Nov. 1, 2023).....	8
<i>Akins v. Secretary of State</i> , 154 N.H. 67 (2006).....	11
<i>American Council of the Blind of Indiana v. Indiana Election Commission</i> , 2022 WL 702257 (S.D. Ind. Mar. 9, 2022).....	16
<i>Bell v. Pike</i> , 53 N.H. 473 (1873).....	9
<i>Below v. Gardner</i> , 148 N.H. 1 (2002) (per curiam).....	15
<i>Deere & Co. v. State</i> , 2013 WL 9889004 (N.H. Super. Ct. Sept. 19, 2013)	15
<i>Doe v. State</i> , 167 N.H. 382 (2015).....	11, 14
<i>Duffley v. New Hampshire Interscholastic Athletic Association</i> , 122 N.H. 484 (1982)	12, 13
<i>Elrod v. Burns</i> , 427 U.S. 347 (1976)	15
<i>Goldberg v. Kelly</i> , 397 U.S. 254 (1970)	12
<i>Guare v. New Hampshire</i> , 167 N.H. 658 (2015)	1
<i>Illinois Elections Board v. Socialist Workers Party</i> , 440 U.S. 173 (1979).....	15
<i>League of Women Voters of North Carolina v. North Carolina</i> , 769 F.3d 224 (4th Cir. 2014)	15, 16, 17
<i>League of Women Voters of New Hampshire v. Gardner</i> , 2018 WL 5929043 (N.H. Super. Ct. Oct. 22, 2018), <i>aff'd</i> , 174 N.H. 312 (2021)	15, 16
<i>New Hampshire Democratic Party v. Secretary of State</i> , 174 N.H. 312 (2021)	1, 5, 11, 12, 15
<i>New Hampshire Department of Environmental Services v. Mottolo</i> , 155 N.H. 57 (2007)	9
<i>Obama for America v. Husted</i> , 697 F.3d 423 (6th Cir. 2012)	16
<i>Petition of Bagley</i> , 128 N.H. 275 (1986)	11, 12, 16
<i>Purcell v. Gonzalez</i> , 549 U.S. 1 (2006)	16
<i>Reynolds v. Sims</i> , 377 U.S. 533 (1964).....	11

<i>State v. Veale</i> , 158 N.H. 632 (2009)	10
<i>Taliaferro v. North Carolina State Board of Elections</i> , 489 F. Supp. 3d 433 (E.D.N.C. 2020).....	17
<i>Taylor v. Louisiana</i> , 419 U.S. 522 (1975)	14, 17
<i>UniFirst Corp. v. City of Nashua</i> , 130 N.H. 11 (1987)	16
<i>Wesberry v. Sanders</i> , 376 U.S. 1 (1964).....	12, 15
<i>Yick Wo v. Hopkins</i> , 118 U.S. 356 (1886)	12

CONSTITUTIONS AND STATUTES

N.H. Const.	1, 9, 10, 11, 12
N.H. Rev. Stat.	
§ 7:6-c	5
§ 91-A	5
§ 654:12	2, 3
§ 659.....	10
S.B. 418-FN, 2022 Sess. (N.H. 2023).....	<i>passim</i>

OTHER AUTHORITIES

Brown, Anna, <i>For Some Bills, the Legislative Session Is Just Beginning</i> , NH Business Review (June 28, 2021)	6
Dewitt, Ethan, <i>As Sununu Indicates Support, Legal Questions Around 'Provisional Ballot' Bill Persist</i> , New Hampshire Bulletin (June 7, 2022).....	2
Rayno, Garry, <i>Commentary: The Numbers Tell the Story of NH Elections</i> , InDepthNH (Nov. 19, 2021)	6
Rayno, Garry, <i>Election Statistics Show Growing Percentage of Independent Voters</i> , InDepthNH (Jan. 23, 2021)	5,6
Solender, Andrew, <i>GOP N.H. Governor Calls Biden President-Elect, Says 'No Evidence' of Voter Fraud There</i> , Forbes (Nov. 12, 2020).....	6
Sununu, Chris, <i>Governor Chris Sununu Statement Following Certification of 2020 Election Results</i> (Dec. 2, 2020).....	6

INTRODUCTION

New Hampshire Senate Bill (“S.B.”) 418 is the latest in a series of recent attempts to deny voting rights guaranteed by the New Hampshire Constitution. New Hampshire courts have enjoined each prior effort in this series, holding that each violated the state constitution’s guarantee of the right to vote. *See N.H. Democratic Party v. Sec’y of State*, 174 N.H. 312, 332 (2021); *Guare v. New Hampshire*, 167 N.H. 658, 669 (2015). An injunction is likewise warranted here, because S.B. 418’s creation of a new type of ballot for certain voters—with each such ballot not counted unless the voter completes a burdensome identity-verification process—similarly violates the state constitution.

In particular, plaintiffs, the Democratic National Committee (“DNC”) and the New Hampshire Democratic Party (“NHDP”), seek a preliminary injunction based on two purely legal state constitutional claims that can and should be resolved promptly, before the law suppresses any votes in upcoming elections.

First, S.B. 418 conflicts with the New Hampshire Constitution’s requirement that city and town clerks report the results of an election to the secretary of state within five days of the election, N.H. Const. pt. 2, art. 32, by precluding a final vote count until at least “the seventh day after the election,” S.B. 418 §2, V (Compl. Ex. A). Second, the law violates the state constitution’s due-process guarantee, N.H. Const. pt. 1, art. 15, by giving certain same-day registrants insufficient time and notice to ensure that their votes are counted and that they avoid the risk of criminal prosecution.

Notably, the legislature was told before enacting S.B. 418 that it would likely be unconstitutional. Testifying in support of the bill, for example, defendant Secretary of State David Scanlan repeatedly warned of serious constitutional doubts about the law, and implored

the legislature to have those doubts resolved through an advisory opinion from the state supreme court. The legislature declined to do so, citing both expediency—an insufficient basis for burdening the most fundamental of all rights—and, in the words of the bill’s lead sponsor, the view that “we, as a legislative branch,” should not “subordinate our actions to the courts.” Compl. Ex. D (Apr. 8, 2022 House Election Law Committee Hearing Transcript) at 67. Shortly before S.B. 418 was signed into law, Secretary Scanlan again questioned “whether our constitution permits” S.B. 418’s new scheme. DeWitt, *As Sununu Indicates Support, Legal Questions Around ‘Provisional Ballot’ Bill Persist*, New Hampshire Bulletin (June 7, 2022).¹ The constitution does not permit it. S.B. 418 should be enjoined.

BACKGROUND

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

For nearly three decades, New Hampshire has provided for same-day voter registration, under which people can both register and then vote on election day.

To register to vote, an applicant must complete a voter-registration form and present proof of identity, citizenship, age, and domicile. RSA 654:12, I. An applicant without acceptable documentation of these prerequisites has had to attest under penalty of felony that he or she meets them. RSA 654:12, I(a)-(b), (c)(2)(A). 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). When such a mailing was returned as undeliverable, the secretary of state’s office would conduct an inquiry to identify the voter—including by examining public records or interviewing state residents—and refer to the attorney

¹ <https://newhampshirebulletin.com/2022/06/07/as-sununu-indicates-support-legal-questions-around-provisional-ballot-bill-persist/>.

general for further investigation those applicants whose identity and qualifications the secretary was unable to confirm. RSA 654:12, V(e). The attorney general would then investigate whether the applicant tried to register fraudulently. *Id.*

Until 2023, individuals without proof of identification could register to vote at the polling place on election day using the attestation process just described, and then cast a ballot that was treated the same as all others.

S.B. 418 turned this system on its head. Effective January 1, 2023, S.B. 418 forces anyone seeking to register and vote without documentary proof of identity on election day to submit a new type of provisional ballot, known as an “affidavit ballot,” that is not counted—thereby disenfranchising the person—unless he or she complies with the law’s identify-verification requirements within seven days of the election. More specifically, under S.B. 418, a person registering for the first time in New Hampshire on election day without proof of identity and without an election official claiming to personally recognize the person will be handed (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; the other is provided to the voter, who must return it (along with the requisite documentation of identity) to the secretary of state “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 have his or her photograph taken. *Id.* §4.²

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 the 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.

Within one day after any election, S.B. 418 requires election officials to send the retained copies of “all affidavit ballot verification letters to the secretary of state.” S.B. 418 §2, IV. On the seventh day after the election, if a voter has not delivered to the secretary of state the voter’s copy of his or her verification letter along with the required documentation of identity, 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. 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” on the affidavit ballots of voters who did not complete the verification process. *Id.* §2, VI. The votes cast on those ballots “shall be deducted from the vote total for each affected candidate or each affected issue,” *id.* §2, V. 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.* §2, VI.

² As indicated in the text, same-day registrants who do not provide sufficient documentation of identity 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 are permitted to submit a regular ballot and need not complete any verification process in order for their vote to be counted.

Affidavit-ballot voters who do not complete the verification process within seven days are not just disenfranchised. S.B. 418 requires the secretary of state to compile “[t]he names of affidavit voters whose verification letters are either not returned to the secretary of state or which do not provide the required voter qualifying information” and to refer those names “to the New Hampshire attorney general’s office for investigation in accordance with RSA 7:6-c,” which in turn authorizes criminal prosecution. S.B. 418 §2, VII. Moreover, “[a]ny written, electronic, or other information related to an affidavit voter who” did not “provide[] the required information” to the secretary of state is not protected from “disclosure” under New Hampshire’s Right to Know Law. *Id.* §2, VIII (citing RSA 91-A).

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

S.B. 418 was purportedly enacted “to 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 meaningfully 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 pre-S.B. 418 same-day-registration process was secure, and that “voter fraud [was] not widespread or even remotely commonplace,” *N.H. Democratic Party*, 174 N.H. at 318. Indeed, despite over a million votes having been cast in New Hampshire’s 2020 elections, Rayno, *Election Statistics Show Growing Percentage of*

Independent Voters, InDepthNH (Jan. 23, 2021),³ including over 75,000 general-election votes by election-day registrants, Rayno, *The Numbers Tell the Story of NH Elections*, InDepthNH (Nov. 19, 2022),⁴ the state has not brought a single voter-fraud prosecution, *see* Compl. Ex. C (Apr. 8, 2022 Letter from New Hampshire Attorney General). Consistent with that, Governor Sununu—who later signed S.B. 418 into law—said after the 2020 elections that New Hampshire’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).⁵ He also confirmed 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).⁶ 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).⁷

Even S.B. 418’s proponents, in fact, concede that New Hampshire did not have a voter-fraud problem before its enactment. For example, Secretary Scanlan, a supporter of the legislation, testified at a hearing on the bill that “New Hampshire elections are sound” and 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.

³ <https://indepthnh.org/2021/01/23/election-statistics-show-growing-percentage-of-independent-voters/>.

⁴ <https://indepthnh.org/2022/11/19/the-numbers-tell-the-story-of-nh-elections/>.

⁵ <https://www.governor.nh.gov/news-and-media/governor-chris-sununu-statement-following-certification-2020-election-results>.

⁶ <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>.

⁷ <https://www.nhbr.com/for-some-bills-the-legislative-session-is-just-beginning/>.

418’s lead sponsor, stated later in that same hearing that the “bill was not targeting fraud.” *Id.* at 1.

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.2, 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 if the post office returned a mailing to their asserted address as undeliverable. And, as noted, despite over 75,000 general-election votes by election-day registrants in the 2020 election, *see supra* p.6, the state has not brought a single voter-fraud prosecution with respect to that election.

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

S.B. 418’s proponents in the General Court ignored repeated warnings about the law’s unconstitutionality—including from *supporters* of the bill, such as the secretary of state—and rebuffed the secretary’s repeated requests to have those doubts resolved promptly.

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 that the Senate “send those questions to the [New Hampshire] Supreme Court” for an advisory opinion. *Id.* The Senate declined to use this “tool that the legislature ha[d]” at its disposal. *Id.*

At a later hearing, Senator James Gray (also 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. Explaining why the legislature nonetheless had not sought an advisory opinion, Senator Gray stated that “to do that would take this Bill and

move it to, at least, the next legislative session.” *Id.* at 17. Senator Gray did not want to “lose [his] ability to take action on” the bill in 2022. *Id.* 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 that the legislature “send a Resolution to the Supreme Court and ask them for an advisory opinion on those questions.” *Id.* at 55. When Senator Giuda was asked why the Senate had ignored that advice, he responded that the legislature should not “subordinate our laws that are proposed to the opinion of justices,” and that “we, as a legislative branch,” should not “subordinate our actions to the courts.” *Id.* at 67.

After the bill’s passage, Secretary Scanlan repeated his concern “that there may be a constitutional issue with it,” and restated his view that the bill “should be sent to the court for an opinion.” DeWitt, *supra* p.2. 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 after, several individual and organizational plaintiffs filed two lawsuits challenging S.B. 418 as unconstitutional. *See 603 Forward v. Scanlan*, 2023 WL 7326368, at *2 (N.H. Super. Ct. Nov. 1, 2023). In November 2023, this Court dismissed those lawsuits, without reaching the merits of their constitutional arguments. *Id.* at *5. This lawsuit was filed promptly after that dismissal.

LEGAL STANDARD

To determine whether a preliminary injunction is warranted, this Court considers whether (1) plaintiffs are “likely succeed on the merits,” (2) “there is an immediate danger of irreparable harm to the party seeking injunctive relief, and there is no adequate remedy at law,” and (3) an

injunction is warranted under “established principles of equity.” *N.H. Dep’t of Env’tl Servs. v. Mottolo*, 155 N.H. 57, 63 (2007).

ARGUMENT

I. PLAINTIFFS ARE LIKELY TO SUCCEED WITH THEIR CLAIMS THAT S.B. 418 VIOLATES THE NEW HAMPSHIRE CONSTITUTION

A. Return-Of-Votes Clause

Plaintiffs are likely to succeed on their claim that S.B. 418 violates the New Hampshire Constitution’s requirement that city and town clerks report the results of an election to the secretary of state within five days of the election, *see* N.H. Const. pt. 2, art. 32. Under article 32, local election officials “shall” count, record, and report to the secretary of state “within five days following the election” the total number of votes cast in their locality by persons “qualified to vote.” *Id.* Article 32 is “[t]he paramount law ... by which town-clerks must be governed in performing their duties respecting elections.” *Bell v. Pike*, 53 N.H. 473, 476-477 (1873).

S.B. 418 violates article 32 by precluding a final vote count until, at the earliest, “the seventh day after the election,” S.B. 418 §2, V, making it impossible for local officials to report results within the constitutionally mandated five-day period. Specifically, S.B. 418 provides that “if an affidavit ballot voter has failed to return the verification letter with the missing voter qualifying documentation to the secretary of state” by “the *seventh day* after the election,” then the secretary of state “shall instruct the moderator of the town, city, ward, or district in which the affidavit ballot was cast” that the affidavit ballot is “unqualified” and thus must be “deducted from the vote total.” *Id.* Save in the extremely unlikely scenario that every affidavit-ballot voter in an election completes the verification process before the seven-day deadline, therefore, local election officials cannot know which affidavit ballots are “unqualified” until, at the earliest, the seventh day after the election (and potentially not until the fourteenth day after the election).

That makes it impossible for local officials to count, record, or report the total number of votes cast by those “qualified to vote” within five days of the election—as the state constitution commands. N.H. Const. pt. 2, art. 32. Under S.B. 418, the only type of vote count possibly available to local officials before the seventh day after the election would include votes cast by “unqualified voters.” S.B. 418 §2, VI. Accordingly, S.B. 418 violates New Hampshire’s constitutional guarantee of timely election results.⁸

B. Procedural Due Process

Plaintiffs are also likely to prevail on their claim that S.B. 418 violates the New Hampshire Constitution’s guarantee of procedural due process, both by failing to give new registrants a reasonably sufficient period of time to complete the verification process and by failing to provide any notice to those whose verification submissions are incomplete and who are thus subject to referral for criminal prosecution.

The New Hampshire Constitution provides that “[n]o subject shall be ... deprived of his property, immunities, or privileges, put out of the protection of the law, exiled or deprived of his life, liberty, or estate, but by the judgment of his peers, or the law of the land.” N.H. Const. pt. 1, art. 15. The “law of the land” means “due process.” *State v. Veale*, 158 N.H. 632, 636 (2009).

In assessing a procedural due-process challenge, courts “[f]irst ... determine whether the

⁸ The timing prescribed by S.B. 418 also conflicts with existing statutory law that S.B. 418 does not purport to repeal or amend. First, S.B. 418 conflicts with state law requiring that all votes be counted in a single session and without interruption. RSA 659:63 requires that the “counting of votes ... shall not be adjourned nor postponed until it shall have been completed.” Yet S.B. 418 requires election officers to adjourn the counting of votes for up to two weeks until the affidavit ballots can be verified. S.B. 418 §2, VI. Second, under RSA 659:75, local election officials must 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. That “election return” must reflect “the final count,” RSA 659:70 (emphasis added), because it may be prepared only “[a]fter the tabulation of votes has been completed and the result has been announced by the moderator as provided in RSA 659:70,” which requires the moderator to “announce the final count for each office and question.” RSA 659:71.

challenged procedures concern a legally protected interest,” and “[s]econd ... determine whether the procedures afford the requisite safeguards.” *Petition of Bagley*, 128 N.H. 275, 282-283 (1986).

As an initial matter, the challenged procedures are inadequate to protect two constitutionally protected interests. First, S.B. 418 burdens the right to a “free” election and the “equal right to vote” that the New Hampshire Constitution expressly confers on “every inhabitant of the state of 18 years of age and upwards.” N.H. Const. pt. 1, art. 11. That constitutional “right to vote is fundamental.” *N.H. Democratic Party*, 174 N.H. at 321. “Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized.” *Reynolds v. Sims*, 377 U.S. 533, 562 (1964). Second, the law burdens New Hampshire residents’ property and liberty interests in avoiding the criminal penalties, including incarceration, to which they may be subject if their verification paperwork is rejected. *See* N.H. Const. pt. 1, art. 15.

S.B. 418’s procedures are constitutionally inadequate to protect those interests. To determine whether procedures are adequate, courts balance three factors: “(1) the private interest... affected; (2) the risk of erroneous deprivation of that interest through the procedure used and the probable value of any additional or substitute procedural safeguards; and (3) the government’s interest, including the fiscal and administrative burdens brought about by additional procedural requirements.” *Doe v. State*, 167 N.H. 382, 414 (2015). Applying these factors S.B. 418’s procedures fall short.

First, the private interests affected by S.B. 418’s affidavit-voter verification provisions are strong. The “right to vote is fundamental,” *Akins v. Sec’y of State*, 154 N.H. 67, 71 (2006),

and “preservative of all rights.” *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886). “Other rights, even the most basic, are illusory if the right to vote is undermined.” *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964), *quoted in N.H. Democratic Party*, 174 N.H. at 321.⁹

In addition, New Hampshire residents have a fundamental liberty interest in avoiding criminal prosecution and penalties. *See* N.H. Const. pt. 1, art. 15 (protecting deprivations of “liberty”). And they have a related interest in not being placed on a list of allegedly fraudulent voters transmitted to the attorney general. The “stigmatization that attends” such governmental labeling “may amount to a deprivation of constitutionally protected liberty.” *Petition of Bagley*, 128 N.H. at 284 (citations omitted).

Second, S.B. 418’s affidavit-voter verification provisions create an intolerably high risk of erroneously depriving eligible voters of their right to vote—a risk that could easily be mitigated by added procedural safeguards. In particular, S.B. 418 also offers no recourse for voters who believe in good faith that they successfully navigated the verification procedures and are unaware that the post office delivered their verification a day late, or that they failed to meet some other technical requirement. Indeed, S.B. 418 does not even require that these voters be notified, before their ballots are thrown out, that their attempt to verify their identity failed. The scheme therefore strips voters of their constitutional right to “notice and an opportunity to be heard.” *Duffley v. N.H. Interscholastic Athletic Ass’n*, 122 N.H. 484, 492 (1982).

⁹ It is no answer to say that there is no constitutional right to same-day registration. Having chosen to create a same-day-registration regime through which qualified voters can exercise their fundamental right to vote—a regime that, as noted, New Hampshire has had for nearly three decades—the state must provide voters with constitutionally adequate due-process protections in administering this regime. *See Goldberg v. Kelly*, 397 U.S. 254, 262-263 (1970) (a state-created statutory entitlement can trigger due-process requirements). Put another way, the fact that the state is not required to offer same-day registration at all does not mean that it can offer it in an unconstitutional way. (Were it otherwise, the state could, for example, offer same-day registration only to people of a certain race, gender, or religion.)

S.B. 418 also creates an intolerably high risk of erroneously depriving eligible voters of their right to vote due to the limited cure window. As explained, S.B. 418 requires anyone seeking to register and vote without documentary proof of identity on election day to cure the lack of identification by successfully complying with a burdensome verification process within just seven days of the election (unless an election official happens to claim when the person comes to the polls that the official recognizes her). *See* S.B. 418 §2, II(b). Specifically, prospective same-day registrants must procure the relevant documentation, create a physical “copy of any required documentation,” properly return it to the secretary of state in the provided U.S. Postal Service envelope, and remember to also return their verification letters, all within seven days of the election. *Id.* That is a difficult and confusing process (and one likely to disproportionately burden certain groups). Voters who are unable to obtain, copy, and send the documentation within that window, moreover, or who misplace the verification letter, will have no recourse and their ballots will be omitted from the final election tally. *Id.* And if local election officials follow the constitution’s five-day reporting mandate, then the seven-day cure period that S.B. 418 guarantees becomes an empty gesture for any voters who take the full seven-day period guaranteed to them by the statute; they will nonetheless be too late to have their votes counted.¹⁰

Third, although the state has an interest in preventing ineligible people from voting, providing sufficient time to cure any identification or documentation problems and giving voters sufficient notice if their verification submission is rejected would not undermine that interest. That is because taking these measures would not allow voting by people who are truly ineligible.

¹⁰ Subsequent guidance issued by the secretary of state instructed voters to “mail the response within 5 days of the election”—an even shorter period—or else drive up to Concord and deliver it by hand within 7 days. Compl. Ex. E at 1; Compl. Ex. F at 4.

Nor has the state demonstrated that giving voters more time to complete the verification process (or else simplifying that process) and notifying voters of errors in their verification submissions would impose excessive “fiscal and administrative burdens.” *Doe*, 167 N.H. at 414. Neither measure would constitute an entirely new or expensive program; each would merely entail extending a deadline and using pre-existing voter communication tools or information provided in the affidavit package to provide notice of deficient verification submissions. And “administrative convenience” is never a justification to impinge upon fundamental rights. *Taylor v. Louisiana*, 419 U.S. 522, 535 (1975).

In short, plaintiffs are likely to succeed with each of their challenges to S.B. 418. There is, to be sure, an intersection between these challenges. The return-of-votes clause demands quick resolution of the vote-count process, while procedural due process requires sufficient time to ensure that voters are not erroneously deprived of their right to vote. Indeed, any effort to shorten the cure period to comply with the return-of-votes clause would only exacerbate the procedural-due-process violation. There is, however, a way to satisfy both constitutional requirements: enjoining S.B. 418 and thus restoring the pre-S.B. 418 same-day-registration process. That complies with the return-of-votes clause, by eliminating affidavit ballots, with procedural due process, by removing the risk of disenfranchisement.

II. PLAINTIFFS FACE AN IMMEDIATE THREAT OF IRREPARABLE HARM FOR WHICH THEY HAVE NO ADEQUATE REMEDY AT LAW

S.B. 418 threatens immediate and irreparable harm to New Hampshire voters and Democratic election outcomes across the state—and hence to plaintiffs. It is exceedingly likely to prevent voters, including plaintiffs’ members and other individuals who would vote for Democratic candidates, from receiving timely and final election results, from voting, or from having their votes counted in upcoming elections.

First and foremost, S.B. 418 threatens disenfranchisement—a classically irreparable harm that will extend to plaintiffs because those who will be disenfranchised include both plaintiffs’ members and those who will disproportionately vote for the Democratic candidates whose election is a core organizational mission of each plaintiff. New Hampshire courts have acknowledged, as has the U.S. Supreme Court, that “[n]o right is more precious” than the right to vote in free and fair elections, because “[o]ther rights, even the most basic, are illusory if the right to vote is undermined.” *Below v. Gardner*, 148 N.H. 1, 1 (2002) (per curiam) (quoting *Wesberry*, 376 U.S. at 17). The right to vote is thus ““of the most fundamental significance”” in the state’s ““constitutional structure.”” *N.H. Democratic Party*, 174 N.H. at 321 (quoting *Illinois Elecs. Bd. v. Socialist Workers Party*, 440 U.S. 173, 184 (1979)). And denial of the right “unquestionably constitutes irreparable injury.” *Elrod v. Burns*, 427 U.S. 347, 373 (1976).

Indeed, this Court recently emphasized that when it preliminarily enjoined the state from limiting how registrants could establish their domicile. *See League of Women Voters of N.H. v. Gardner*, 2018 WL 5929043, at *10-11 (N.H. Super. Ct. Oct. 22, 2018), *aff’d*, 174 N.H. 312 (2021). As it explained, courts ““routinely deem restrictions on fundamental voting rights irreparable injury.”” *Id.* at *10 (quoting *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 247 (4th Cir. 2014)). That is because once an election ““occurs, there can be no do-over and no redress.”” *Id.* (quoting *League of Women Voters of N.C.*, 769 F.3d at 247). Furthermore, this Court has found irreparable harm “where an unconstitutional law will impose ... criminal penalties ... for non-compliance.” *Deere & Co. v. State*, 2013 WL 9889004, at *12 (N.H. Super. Ct. Sept. 19, 2013). S.B. 418’s referral-for-prosecution provision thus independently threatens irreparable harm, because voters referred for criminal prosecution are

immediately stigmatized and face the threat of an impending investigation for voter fraud. *See Petition of Bagley*, 128 N.H. at 284.

In addition to the harm inflicted on voters (including plaintiffs' members), S.B. 418, as indicated, threatens immediate and irreparable harm to plaintiffs themselves. Specifically, the law is undermining the DNC's and NHDP's ability to support Granite Staters who seek to elect Democrats. Each day that S.B. 418 remains in place, the DNC, NHDP, and affiliated candidates must invest organizational resources to educate voters and protect their threatened rights. They must also prepare for delayed vote counts and contests over which affidavit ballots count.

As this Court has explained, there is "no adequate, alternative remedy" when a "law threatens to disenfranchise" voters. *League of Women Voters of N.H.*, 2018 WL 5929043, at *11. "[T]he only viable remedy is to enjoin its enforcement." *Id.* That is because once the "right to vote is interfered with, no amount of money damages or other relief awarded after" an election "will compensate for" the disenfranchisement a voter experiences leading up to and on election day. *Am. Council of the Blind of Ind. v. Ind. Elec. Comm'n*, 2022 WL 702257, at *9 (S.D. Ind. Mar. 9, 2022).

III. PRINCIPLES OF EQUITY FAVOR AN INJUNCTION

An injunction is "in the public interest," *UniFirst Corp. v. City of Nashua*, 130 N.H. 11, 14 (1987), because the public retains a "strong interest in exercising the fundamental political right to vote," *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006) (per curiam) (quotation marks omitted). That strong interest is best served by "permitting as many qualified voters to vote as possible." *League of Women Voters of N.H.*, 2018 WL 5929043, at *11 (quoting *Obama for Am. v. Husted*, 697 F.3d 423, 437 (6th Cir. 2012)); *see also League of Women Voters of N.C.*, 769 F.3d at 247 (similar).

On the other side of the ledger, enjoining S.B. 418 would in no way harm the state's election apparatus. As discussed, S.B. 418 does nothing to advance the public's interest in election integrity. *See supra* p.5. And even if injunctive relief might impose some procedural costs on the state, "administrative convenience" is never a justification to impinge upon fundamental rights. *Taylor*, 419 U.S. at 535. That is particularly true here, where an injunction would restore the straightforward same-day registration system that was in place in the state for the nearly three decades before S.B. 418's enactment. Where "systems have existed, do exist, and simply need to be resurrected" to restore a previous same-day voter registration regime, the public interest in enjoining the new system and restoring the prior one outweighs any countervailing administrative burdens. *League of Women Voters of N.C.*, 769 F.3d at 248.

S.B. 418's legislative history makes an injunction especially appropriate here because legislators pushed the law through despite known concerns about its constitutionality. As discussed, the state enacted and implemented S.B. 418 even though legislators and state officials were repeatedly informed of the constitutional violations it would wreak. Instead of engaging in a good-faith effort to address those concerns, proponents of the law punted to this Court and, in Secretary Scanlan's words, "[t]hrew it up to somebody else" to address the constitutional fallout. *DeWitt, supra* p.2. In considering a challenge to North Carolina's absentee-voting procedures, a federal court factored into its weighing of the equities the fact that the state had similarly failed to address known constitutional concerns with its new election procedures. *See Taliaferro v. N.C. State Bd. of Elecs.*, 489 F.Supp.3d 433, 439 (E.D.N.C. 2020). As in that case, unless this Court grants immediate injunctive relief, New Hampshire's legislators will be rewarded for abdicating their constitutional responsibilities.

CONCLUSION

This Court should preliminarily enjoin the enforcement of S.B. 418.

Dated: December 22, 2023

Respectfully submitted,

/s/ William E. Christie
William E. Christie, #11255
Shaheen & Gordon, P.A.
107 Storrs Street
Concord, N.H. 03302
(603) 225-7262
wchristie@shaheengordon.com

Seth P. Waxman*
Daniel S. Volchok*
Christopher E. Babbitt*
Joseph M. Meyer*
Jane E. Kessner*
Nitisha Baronia*
Wilmer Cutler Pickering Hale and Dorr LLP
2100 Pennsylvania Avenue N.W.
Washington, D.C. 20037
(202) 663-6000 (telephone)
(202) 663-6363 (fax)
seth.waxman@wilmerhale.com
daniel.volchok@wilmerhale.com
christopher.babbitt@wilmerhale.com
joseph.meyer@wilmerhale.com
jane.kessner@wilmerhale.com
nitisha.baronia@wilmerhale.com

**Pro hac vice applications
forthcoming*

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was transmitted by electronic filing to all counsel of record.

Dated: December 22, 2023

Respectfully submitted,

/s/ William E. Christie
William E. Christie, #11255

RETRIEVED FROM DEMOCRACYDOCKET.COM