THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS. **SUPERIOR COURT**

Democratic National Committee, et al.

v.

David M. Scanlan,
New Hampshire Secretary of State, et al.

Docket No.: 226-2023-CV-00613

ORDER ON MOTIONS TO DISMISS AND PRELIMINARY INJUNCTION

The plaintiffs, the Democratic National Committee ("DNC") and the New Hampshire Democratic Party ("NHDP"), bring this action against David M. Scanlan and John M. Formella, in their official capacities as New Hampshire Secretary of State and Attorney General, respectively, (together the "State") seeking a preliminary injunction and further declaratory and injunctive relief related to SB 418, an election law providing for affidavit ballot voting. (Court index ##1–3.) The Republican National Committee ("RNC") and the New Hampshire Republican State Committee ("NHRSC") intervened in the action. (Court index #13.) The State and intervenors move to dismiss. (Court index ##15, 17.) The plaintiffs object, to which the State and intervenors reply. (Court index ##20, 21, 26, 29.) On March 12, 2024, the Court held a hearing on the motions to dismiss and motion for preliminary injunction. For the reasons stated below, the State's and intervenors' motions to dismiss are GRANTED with respect to Count I of the complaint and DENIED with respect to Count II, and the plaintiffs' motion for preliminary injunction is DENIED.

Factual Background

The Court recounts the following facts in accordance with the legal standard.

On June 17, 2022, the New Hampshire legislature enacted SB 418. (Compl. ¶ 2.) On January 1, 2023, SB 418 went into effect. Laws 2022, ch. 239. In the findings portion of SB 418, the New Hampshire legislature recognized that in the last 45 years, 44 state elections had been decided in a tie or by one vote, and in the 2016 general election at least 10 illegal ballots were cast and the identity of 230 voters could not be verified. (Compl., Ex. A.) Thus, through SB 418, the legislature sought to prevent unverified votes from counting in New Hampshire elections. (Compl., Ex. A) ("Allowing unverified votes to count in an election enables the corruption of New Hampshire's electoral process. This must be addressed immediately to restore the integrity of New Hampshire elections.") Mechanically, SB 418 amended RSA 659 and RSA 660 by adding new sections RSA 659:23-a and RSA 660:17-a, and by amending RSA 659:13, I(c). (See id.) These changes codified the new affidavit ballot voting procedure within SB 418.

Affidavit Ballot Voting under SB 418

The affidavit ballot voting procedure within SB 418 applies to any first-time New Hampshire voter who registers on election day but lacks a valid photo identification, or otherwise fails to meet the statutory identification requirements of RSA 659:13. RSA 659:23-a, I. In those instances, an election official will hand the voter an affidavit voter package and explain its use. RSA 659:23-a, II. The affidavit voter package contains a prepaid envelope addressed to the Secretary of State and an affidavit voter verification letter listing any documents the voter must provide to verify their identity. RSA 659:23-a, II (a), (b).

After a voter casts an affidavit ballot, local election officials mark the ballot with a unique affidavit ballot number, place it in a container designated "Affidavit Ballots," and hand count the number of affidavit ballots. RSA 659:23-a, IV. "After completion of counting, the moderator shall note and announce the total number of votes cast for each candidate, and the total number of affidavit ballots cast in the election." Id. "No later than one day after the election, the moderator shall forward all affidavit ballot verification letters to the secretary of state . . . ." Id.

The affidavit ballot voter must return the verification letter and any necessary documents to verify their identity to the Secretary of State within seven days. RSA 659:23-a, II (b). "On the seventh day after the election, if an affidavit ballot voter has failed to return the verification letter with the missing voter qualifying documentation . . . the secretary of state shall instruct the moderator . . . to retrieve the associated numbered affidavit ballot and list . . . the votes cast on that ballot." RSA 659:23-a, V. "The votes cast on such unqualified affidavit ballots shall be deducted from the vote total for each affected candidate or each affected issue." Id.

Within 14 days of the election, the city, town, ward, or district must provide the Secretary of State with a summary report of the total votes cast by unqualified voters. RSA 659:23-a, VI. "The 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. The names of the affidavit ballot voters who fail to satisfy the identity verification process are referred to the Secretary of State for investigation. RSA 659:23-a, VII. SB 418 does not require notice to voters whose votes are determined to be unqualified or whose name is referred for investigation. (Compl. ¶ 34.)

The Plaintiffs

The DNC is a national committee whose "organizational purposes and functions are to communicate the Democratic Party's position and messages on issues; protect voters' rights; and aid and encourage the election of Democratic candidates at the national, state, and local levels . . . ." (Id. ¶¶ 8–9.) The DNC not only persuades and organizes citizens "to register to vote as Democrats but also to cast their ballots for Democratic nominees and candidates." (Id. ¶ 9.) The DNC operates in every U.S. state, territory, and the District of Columbia. (Id. ¶ 10.)

The NHDP is a state committee whose purpose is to "elect candidates of the Democratic Party to public office throughout New Hampshire." (Id. ¶ 11.) NHDP supports democratic candidates and protects voters' rights through fundraising and organizing efforts. (Id.) NHDP has many members who vote for or otherwise support democratic candidates, including those who will register on election day. (Id. ¶ 12.) NHDP has over 264,000 registered members. (Id. ¶ 13.)

Relevant Voting Facts and Alleged Effect on Elections

According to the plaintiffs, in the New Hampshire general election in 2020, 75,612 voters registered on election day, representing nearly 10% of the electorate.[1] (Id.) In that election, the plaintiffs allege that the "precincts with the highest number of election-day registrations tended to be areas with the highest number of young, non-white, and/or low-income voters," and that those precincts "also voted overwhelmingly for Democratic candidates." (Id. ¶ 25.) Despite the fact that SB 418's affidavit ballot

[1] If SB 418 has been in place in 2020, only a percentage of those voters would have been required to vote by affidavit ballot, as first-time voters who provide satisfactory identification would cast their ballots without further requirements.

procedure has been in effect during several elections, including the 2024 presidential primary, the plaintiffs have not named a member of either organization whose right to vote, or right to be elected, has been violated.

The plaintiffs allege that because SB 418 changes the way that some voters, including those who tend to vote for Democratic candidates, will cast their ballots, the DNC and NHDP "will have to engage in a broad-based education program targeting thousands of New Hampshire Democratic voters as well as Democratic candidates." (Id. ¶ 14.) The plaintiffs allege that such an informational campaign would likely include revising and distributing educational and advertising information by mail and online, hiring additional staff, training volunteers, and extending staff payroll by an additional week to support post-election work. (Id.) The plaintiffs allege SB 418 will likely "cost at least tens of thousands of dollars and hundreds, if not thousands, of hours of work by DNC and NHDP employees," and will divert resources from other activities essential to their core purpose, including get-out-the-vote and voter registration initiatives. (Id.)

Analysis

The plaintiffs petition this Court for declaratory and injunctive relief, and move for preliminary injunction, on the basis that SB 418 facially violates Part I, Article 15 and Part II, Article 32 of the New Hampshire Constitution. The State and intervenors object and move to dismiss, contending that the plaintiffs lack standing to bring their claims and, alternatively, that SB 418 is not facially unconstitutional. The Court first addresses the motions to dismiss, then addresses the plaintiffs' motion for preliminary injunction.

Motions to Dismiss

"Generally, in ruling upon a motion to dismiss, the trial court is required to determine whether the allegations contained in the petitioners' pleadings are sufficient to state a basis upon which relief may be granted." Avery v. N.H. Dep't of Educ., 162 N.H. 604, 606 (2011). The Court assumes all well-pleaded facts in the complaint to be true and construes all reasonable inferences in the light most favorable to the plaintiff. Weare Bible Baptist Church, Inc. v. Fuller, 172 N.H. 721, 725 (2019). The Court then engages in a threshold inquiry that tests the facts alleged by the plaintiff against the applicable law, and if the allegations constitute a legal basis for relief, must deny the motion to dismiss. Pro Done, Inc. v. Basham, 172 N.H. 138, 141-42 (2019). "In conducting this inquiry, [the court] may also consider documents attached to the plaintiffs' pleadings, documents the authenticity of which are not disputed by the parties, official public records, or documents sufficiently referred to in the complaint." Boyle, 172 N.H. at 553 (quoting Ojo v. Lorenzo, 164 N.H. 717, 721 (2013)).

I. Standing

However, "[w]hen the motion to dismiss . . . raises certain defenses, the trial court must look beyond the [plaintiffs'] unsubstantiated allegations and determine, based on the facts, whether the [plaintiffs] ha[ve] sufficiently demonstrated [their] right to claim relief." Avery, 162 N.H. at 606. (quotation omitted). "A jurisdictional challenge based upon lack of standing is such a defense." Id. at 607.

The State argues that the plaintiffs lack standing to petition for declaratory judgment for four reasons: (1) the plaintiffs are not persons eligible to vote in New Hampshire; (2) the plaintiffs have not identified any member who has been required to vote by affidavit ballot; (3) the plaintiffs have not identified any member who was

deterred from voting due to SB 418; and (4) the plaintiffs have not identified any member whose vote was unqualified, and therefore deducted, under SB 418. (Court index #15 ¶¶ 20–22.) Further, to the extent the plaintiffs claim they have standing under a diversion of resources theory, the State argues the plaintiffs have not alleged that they have spent any money on, or taken any steps towards, carrying out a broad-based voter education program. (Id. ¶ 23.)

The plaintiffs argue they have organizational standing because SB 418 undermines their primary purpose of maximizing the number of votes for Democratic candidates and would require plaintiffs to expend significant financial and human resources to educate voters on the law. (Court index #22 at 10–14.) The plaintiffs further contend that they have organizational standing as the representatives of their members, including potential voters and political candidates who have constitutional rights to vote and be elected under Part I, Article 11. (Id.)

The United States Supreme Court has found that political parties have standing to contest election laws under Article III of the United States Constitution. Crawford v. Marion Cnty. Election Bd., 553 U.S. 181, 189 n.7 (2008) (stating that the court agreed with the "unanimous view" of the District Court and Court of Appeals that the Indiana Democratic Party had standing to challenge an Indiana election law requiring in-person voters to present photo identification). More generally, the court has recognized organizational standing in two forms. Students for Fair Admissions, Inc. v. President and Fellows of Harvard Coll., 600 U.S. 181, 199 (2023). "Either the organization can claim that it suffered an injury in its own right or, alternatively, it can assert standing solely as the representative of its members." Id. To proceed as the representative of its

members, the organization must demonstrate that: (1) "its members would otherwise have standing to sue in their own right;" (2) "the interests it seeks to protect are germane to the organization's purpose;" and (3) "neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." Id.

The New Hampshire Supreme Court, on the other hand, has not decided whether political parties have organizational standing to petition for declaratory judgment. See N.H. Democratic Party v. Sec'y of State, 174 N.H. 312 (2021) (affirming injunction after superior court determined NHDP had organizational standing sufficient to petition under RSA 491:22); but see Duncan v. State, 166 N.H. 630, 640 (2014) ("[W]hen questions of jurisdiction have been passed on in prior decisions *sub silentio*, this Court has never considered itself bound when a subsequent case finally brings the jurisdictional issue before us.") (quoting Hagans v. Lavine, 415 U.S. 528, 535 n.5 (1974)). Thus, when political party plaintiffs have asserted organizational standing in the superior court, they have reached different outcomes. See N.H. Democratic Party v. Gardner, No. 226-2017-CV-00433, 2018 WL 5929044 (N.H. Super. Apr. 10, 2018) (finding organizational standing for the NHDP and League of Women Voters of New Hampshire based on a diversion of resources theory); 603 Forward v. Scanlan, No. 226-2022-CV-00233, 2023 WL 7326368 (N.H. Super. Nov. 1, 2023) (dismissing organizational plaintiff's claim under a diversion of resources theory because plaintiffs lacked a legal or equitable right sufficient to confer standing to challenge the validity of a statute).

While constitutional standing only requires that a plaintiff suffer an injury in fact, the New Hampshire Supreme Court has stated that a plaintiff must show more to

petition for declaratory judgment under RSA 491:22. Avery v. N.H. Dep't of Educ., 162 N.H. 604, 608 (2011). Rather, a party only has standing to petition for declaratory judgment "where the party alleges an impairment of a present legal or equitable right arising out of the application of the rule or statute under which the action has occurred." Id. Considering this distinction, the New Hampshire Supreme Court has dismissed declaratory claims where an organization seeks to file suit on behalf of its members. See Benson v. N.H. Ins. Guar. Ass'n, 151 N.H. 590, 593 (2004) (holding that a medical society which represented doctors lacked standing under RSA 491:22).

However, the New Hampshire Supreme Court has also described a petition for declaratory judgment as "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," Boehner v. State, 122 N.H. 79, 83 (1982), and has stated that the declaratory judgment statute "should not be restricted by a narrow interpretation of its scope." Faulkner v. City of Keene, 85 N.H. 147, 155 (1931). Specifically, the Faulkner court noted the insignificance of the distinction between constitutional standing and standing for declaratory judgment by stating:

> It should also be said that under our liberal practice the distinction between causes that properly come under the provisions of the [declaratory judgment] act of 1929 and those maintainable without the aid of that statute is not of much practical importance. The cause being plainly presented to the court, the appropriate remedy will be granted, however erroneously the proceeding be entitled.

Id. at 201. Although the court was interpreting the original Declaratory Judgment Act of 1929, that law contained the same language as RSA 491:22 requiring a "legal or equitable right or title." Id. at 197.

Considering the foregoing, the Court determines that the plaintiffs' alleged diversion of resources, along with their representative capacity on behalf of voters and candidates with constitutional rights to vote and to be elected, confers them with organizational standing sufficient to petition for declaratory judgment under RSA 491:22. Beyond the practical guidance of Faulkner and the federal recognition of organizational standing, the Court further finds that policy considerations favor allowing political parties to contest the constitutionality of election laws. As recognized by the legislature in the text of SB 418 itself, there is a significant public interest in ensuring that New Hampshire elections remain free of corruption. This concern is also reflected in our state constitution, which mandates that "[a]ll elections are to be free, and every inhabitant . . . shall have an equal right to vote in any election . . . [and] to be elected into office." N.H. CONST. pt. I, art. 11. If courts prevent political parties from challenging election laws on behalf of their members, the duty to ward off potentially discriminatory and unconstitutional election laws will fall upon private individuals, who would be required to proactively identify and legally challenge potentially problematic legislation, and likely to do so without the resources, support, or political drive to mount such a challenge. Further, any harm that may result from improper election procedures cannot easily be remedied after the fact. Denying standing would impose an unnecessary hurdle against the public interest in ensuring New Hampshire voters are able to vote in elections free of corruption and would be inconsistent with the purpose of our declaratory judgment statute. See Beaudoin v. State, 113 N.H. 559, 562 (1973) (declaratory judgment is a "broad remedy which should be liberally construed so as to effectuate the evident statutory purpose of making a controversy over a legal or equitable right justiciable at an

earlier stage of the controversy than it would be if the matter were pursued in an action at law or in equity.").

Accordingly, the Court determines that the concept of organizational standing provides the plaintiffs with a legal right sufficient to petition for declaratory judgment under RSA 491:22.

II. Failure to State a Claim

a. Count I – Return of Votes Clause under Part II, Article 32

The plaintiffs contend that SB 418 is facially unconstitutional because it prevents town clerks from reporting the number of qualified votes to the Secretary of State within five days of an election as mandated by Part II, Article 32, which states:

> The meetings for the choice of governor, council and senators, shall be warned by warrant from the selectmen, and governed by a moderator, who shall, in the presence of the selectmen (whose duty it shall be to attend) in open meeting, receive the votes of all the inhabitants of such towns and wards present, and qualified to vote for senators; and shall, in said meetings, in presence of the said selectmen, and of the town or city clerk, in said meetings, sort and count the said votes, and make a public declaration thereof, with the name of every person voted for, and the number of votes for each person; and the town or city clerk shall make a fair record of the same at large, in the town book, and shall make out a fair attested copy thereof, to be by him sealed up and directed to the secretary of state, within five days following the election, with a superscription expressing the purport thereof.

The State and intervenors argue that there is no requirement that the town clerk's report be a final value and, therefore, the fact that town clerks may need to make adjustments to the number of votes after the five-day report is complied with does not violate the constitutional mandate.

"In reviewing a legislative act, [the Court] presume[s] it to be constitutional and will not declare it invalid except upon inescapable grounds." Contoocook Valley Sch. Dist. v. State, 174 N.H. 154, 161 (2021). "This presumption requires that [the Court] will

hold a statute to be constitutional unless a clear and substantial conflict exists between it and the constitution." Id. "When doubt exists as to the constitutionality of a statute, those doubts must be resolved in favor of its constitutionality." Id. "The party challenging a statute's constitutionality bears the burden of proof." Id.

A party "may challenge the constitutionality of a statute by asserting a facial challenge, an as-applied challenge, or both." State v. Hollenbeck, 164 N.H. 154, 158 (2012). "A facial challenge is a head-on attack of a legislative judgment, an assertion that the challenged statute violates the Constitution in all, or virtually all, of its applications." Id. "A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." State v. Furgal, 161 N.H. 206, 210 (2010). "In other words, [the Court] will not hold a statute to be unconstitutional unless a clear and substantial conflict exists between it and the constitution." N.H. Ass'n of Cntys. v. State, 158 N.H. 284, 288 (2009).

Even when drawing all reasonable inferences in the light most favorable to the plaintiffs, the Court determines that the mere uncertainty that SB 418 could prevent town clerks from complying with their constitutional duties does not create a "clear and substantial conflict with the constitution" necessary to maintain their action.

In coming to this conclusion, the Court finds N.H. Association of Counties instructive. In that case, the challenged statute, SB 409, required counties to pay a share of the cost for the medical care of elderly persons through certain programs. Id. at 286–87. While the statutes mandating payments to those programs were to be repealed, SB 409 contained a sunset provision extending the counties obligations to

pay. Id. at 287. The state then continued to extend the sunset provision for several years. Id. The plaintiffs in that case challenged the constitutionality of SB 409, arguing that it violated Article 28-a of the New Hampshire Constitution, which prohibited the state from requiring additional expenditures by political subdivisions unless such programs were fully funded by the state or approved by vote of the subdivision's legislative body. Id. at 288. However, the New Hampshire Supreme Court determined that it was uncertain whether SB 409 would impose additional financial expenditures by counties, and therefore SB 409 was not unconstitutional. Id. at 289. The Court reasoned that "no new, expanded, or modified program or responsibility had been enacted, or, to the extent that it has, there is no requirement of additional local expenditures and thus no violation of Article 28-a." Id. Further, the Court noted that because the state had statutory authority to place a cap on the county spending, the state could choose to do so to prevent a constitutional violation. Id. at 291.

Like the statutory scheme applicable in N.H. Association of Counties, SB 418 employs a statutory cap, albeit one that limits the number of days available to a voter to return their verification letter. While an affidavit voter may have a maximum of seven days to comply with the statute, they could also comply by proving their identity on the first, second, third, fourth, fifth, or sixth day after the election. Thus, whether the town's report on the fifth day following the election truly represents the number of qualified votes is uncertain and depends on the rate at which affidavit ballot voters submit their identity-proving documentation to the Secretary of State. As exemplified by N.H. Ass'n of Cntys., the Court determines such uncertainty does not rise to the level of a "clear and substantial conflict" with the constitution. See id. at 288.

Accordingly, because the Court determines that Count I of the plaintiffs' complaint does not state a claim upon which relief may be granted, the State and intervenors' motion to dismiss this count is GRANTED.

b. Count II – Procedural Due Process under Part I, Article 15

The plaintiffs allege SB 418 violates procedural due process under Part I, Article 15 because the law does not provide voters sufficient time to submit identity-proving documents and fails to notify or provide a hearing to voters whose votes are disqualified, which unnecessarily risks erroneous deprivation of their members' rights to vote and be elected as protected by Part I, Article 11. The plaintiffs further allege that because SB 418 does not require state or local officials inform voters when they are included on the list sent to the Secretary of State for potential investigation due to their failure to cure their identity, SB 418 violates their right to procedural due process as a result of the stigma that attaches due to their inclusion on that list.

The State and intervenors argue that the plaintiffs do not have an interest that entitles them to due process protection. Alternatively, the State and intervenors contend that the plaintiffs' allegations fail to state a claim that New Hampshire's election laws provide insufficient process regarding voting rights. The intervenors additionally contend that this Court should dismiss the plaintiffs' procedural due process claim because they failed to challenge SB 418 as burdening the right to vote under Part I, Article 11, and a procedural due process claim is not a mechanism to challenge the state's election laws.

The Court recognizes the intervenors argument that the plaintiffs have not specifically asserted a challenge to SB 418 based on the burden on the right to vote

under Part I, Article 11. Indeed, Part I, Article 11 has served as a traditional vehicle for plaintiffs, including the NHDP, to challenge New Hampshire election laws regarding voter qualification. See N.H. Democratic Party, 174 N.H.; Guare v. State, 167 N.H. 658, 663 (2015). In challenges under Part I, Article 11, New Hampshire courts apply a unique balancing test to determine the level of scrutiny based on the severity of the restriction of the right to vote. See Guare, 167 N.H. at 663. Instead, here the plaintiffs argue that the right to procedural due process attaches to the right to vote and to be elected, and that the process within SB 418 is insufficient in protecting against an erroneous deprivation of that right in comparison to the State's interest.

In Arizona Democratic Party v. Hobbs, 485 F. Supp. 3d 1073, 1093 (D. Ariz. 2020), the United States District Court for the District of Arizona grappled with the same uncertainty the Court faces here – whether to analyze a due process claim implicating the right to vote under the traditional procedural due process framework or, rather, under the framework applicable to the burdening of the right to vote. In the federal context, the Hobbs court found the distinction insignificant because the court determined the plaintiffs prevailed under both relevant frameworks. Id. On appeal, the United States Court of Appeals for the Ninth Circuit agreed with the Fifth and Eleventh Circuits that the federal voting rights framework (referred to as the Anderson/Burdick framework) was "better suited to the context of election laws than is the more general Eldridge [traditional due process] test." Arizona Democratic Party v. Hobbs, 18 F.4th 1179, 1195 (9th Cir. 2021). Faced with the same dilemma as the trial court in Hobbs, this Court analyzes the plaintiffs' procedural due process claim under both the

traditional procedural due process framework and the framework applied when voting rights are alleged to be burdened.

Analysis under Traditional Procedural Due Process

"In determining whether challenged procedures satisfy the due process requirement, [the Court] employ[s] a two-part analysis." Petition of Bagley, 128 N.H. 275, 282 (1986). "First, [the Court] determine[s] whether the challenged procedures concern a legally protected interest." Id. at 282–83. "Second, [the Court] determine[s] whether the procedures afford the requisite safeguards." Id. In analyzing whether the procedures afford requisite safeguards, the Court considers three factors: "(1) the private interest that will be affected by the official action; (2) the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and (3) the government's interest." State v. Ploof, 162 N.H. 609, 619 (2011).

Regarding the first factor, the plaintiffs have asserted that SB 418 will affect their members' constitutional rights to vote and to be elected. The Court determines that such constitutional rights are subject to the protection of due process. See N.H. CONST. pt. I, art. 11 (providing New Hampshire inhabitants with a constitutional right to vote and to be elected into office); Wesberry v. Sanders, 376 U.S. 1, 17 ("No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live.").

Regarding the second factor, the plaintiffs allege that SB 418 will result in the disenfranchisement of their voters because a large number of New Hampshire democratic voters tend to be young, non-white, low-income persons who are more

prone to utilize same-day registration. The plaintiffs further allege that such persons are more likely to have difficulty in acquiring identity-proving documentation within the seven day period. To stress the severity of this disenfranchisement, the plaintiffs have provided data demonstrating that nearly 10% of New Hampshire voters utilized same-day registration in the 2020 general election.

In accepting the plaintiffs' allegations as true and making all reasonable inferences in their favor, for the purposes of this analysis, it can be reasonably inferred that SB 418, a procedure which only applies to first-time voters in New Hampshire who register on election day without documentation of their identity, poses a risk of depriving some qualified voters of their right to vote. In coming to this conclusion, the Court finds recent litigation regarding SB 3, a law regarding proof of domicile, illustrative.

In League of Women Voters of N.H. v. Gardner, No. 226-2017-CV-00433, 2020 WL 4343486, at *5-9 (N.H. Super. Apr. 8, 2020), the trial court addressed similar voting qualification procedures enacted under SB 3, but had before it a fully developed summary judgment record, including expert reports as to the burden the procedures had on the right to vote. Ultimately, the court determined SB 3 was unconstitutional and granted summary judgment and an injunction in favor of the plaintiffs because SB 3 imposed a significant restriction on the right to vote.[2] Id. at *12. On appeal, the New Hampshire Supreme Court upheld the trial court's order. See N.H. Democratic Party, 174 N.H. at 314.

[2] While League of Women Voters of N.H. analyzed the burden on the right to vote under Part I, Article 11, and not Part I, Article 15 as the plaintiffs assert, this Court finds that analysis relevant to the risk of erroneous deprivation that SB 418 may impose.

Here, the plaintiffs have alleged that SB 418 will disenfranchise democratic voters in a similar manner to the litigation in SB 3. While the SB 3 case was decided in relation to Part I, Article 11, the Court finds such potential voter disenfranchisement, if shown, could result in a risk of erroneous deprivation to the right the vote and to be elected. Therefore, without the benefit of a fully developed record the Court cannot analyze the balance between the risk of deprivation of the right to vote or be elected to the State's interest in preventing voter fraud.

Accordingly, the Court determines that, at this early pleading stage, the plaintiffs have sufficiently pled a claim under a traditional due process framework. The parties are directed to develop an expedited discovery schedule for further development of the record, and submit it to the Court by April 22, 2024.

Analysis under Voting Rights Framework

"Although the right to vote is fundamental, [the Court] do[es] not necessarily subject *any* impingement upon that right to strict scrutiny." Guare, 167 N.H. at 663 (emphasis in the original). "Instead, [the Court] appl[ies] a balancing test to determine the level of scrutiny that [the Court] must apply." Id. "When [voting] rights are subjected to severe restrictions, the regulation must be narrowly drawn to advance a state interest of compelling importance." Id. (quotation omitted). "But when a state election law provision imposes only reasonable, nondiscriminatory restrictions upon the right of voters, the State's important regulatory interests are generally sufficient to justify the restrictions." Id. However, "[m]ost cases fall in between these two extremes." Id.

At the pleading stage, the Court cannot find that SB 418 imposes only reasonable, nondiscriminatory restrictions on the right to vote. First, SB 418 is not

uniformly applied. Rather, the law only applies to first-time New Hampshire voters using same-day registration. As alleged by the plaintiffs, and as described above, a significant percentage of New Hampshire voters register to vote on election day, and the highest number of those voters tend to be young, non-white, and/or low-income, and vote for democratic candidates. Thus, it is reasonable to infer that the application of SB 418 could more severely burden the right to vote of young, non-white, and/or low-income voters than others.

Accordingly, the Court determines the plaintiffs have sufficiently plead a claim for relief under the voting rights framework, as described in Guare, 167 N.H. at 663-64.

Preliminary Injunction

The plaintiffs argue that they are entitled to preliminary injunctive relief based on two state constitutional claims that should be resolved before SB 418 suppresses any votes in upcoming elections. (Court index #3 at 8.)

"The issuance of injunctions, either temporary or permanent, has long been considered an extraordinary remedy." N.H. Dep't of Env't Servs. v. Mottolo, 155 N.H. 57, 63 (2007). "A preliminary injunction is a provisional remedy that preserves the status quo pending a final determination of the case on the merits." Id. To issue a preliminary injunction, the Court must determine the plaintiff: (1) has no adequate remedy at law; (2) faces an immediate danger of irreparable harm; and (3) is likely to succeed on the merits. Id. This Court has "sound discretion to grant an injunction after consideration of the facts and established principles of equity." Id.

The Court determines, for the reasons articulated above including the lack of a specifically named voter or candidate whose right to vote or be elected has been

infringed by SB 418, that while the plaintiffs pleaded sufficient allegations to prevail against the State and intervenors' motion to dismiss Count II, they have not demonstrated that absent preliminary relief, irreparable harm will result.

Accordingly, the plaintiffs' motion for preliminary injunctive relief is DENIED.

Conclusion

For the foregoing reasons, the State's and intervenors' motions to dismiss are GRANTED with respect to Count I and DENIED with respect to Count II, and the plaintiffs' motion for preliminary injunction is DENIED.

SO ORDERED.

April 16, 2024

Amy L. Ignatius
Presiding Justice

Clerk's Notice of Decision
Document Sent to Parties
on 04/17/2024