

THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS

SUPERIOR COURT

Docket No.

Maxine Mosley and Donna Soucy

v.

David M. Scanlan,

in his official capacity as the New Hampshire Secretary of State

**MEMORANDUM IN SUPPORT OF DEFENDANT’S OBJECTION TO
PRELIMINARY AND PERMANENT INJUNCTIVE RELIEF**

NOW COMES the Defendant, David M. Scanlan, in his official capacity as the New Hampshire Secretary of State, by and through counsel, the Office of the Attorney General, and makes his objection to the Plaintiffs’ Motion for Preliminary Injunction, stating as follows:

The State will clearly state what the Plaintiffs are asking for but refuse to say: the Plaintiffs want this Court to disenfranchise New Hampshire voters in the name of “finality” and “fair elections” to preserve an administrative error in a recount rather than allow the process to continue to the required end of its constitutional obligation—identifying the winning candidate as determined by the will of the voters of Manchester Ward 6.

The very purpose of a recount is to ascertain the will of the people, avoid voter disenfranchisement, and ensure that an unwarranted technicality does not destroy the process. The obligation of election officials is to ensure that the will of the voters—as determined by the ballots cast—determines the winner of any election. Instead of seeking to vindicate the will of the Manchester Ward 6 voters, the Plaintiffs insist that the announcement of a vote tally, prior to completing the reconciliation of votes to verify that all were counted, constitutes an irreversible action to lock-in an incomplete count into a victory achieved by disenfranchisement.

FACTS

The State Representative race recount for Hillsborough District 16 started on November 14, 2022. Subsequently, the Secretary of State announced the updated tally of votes in the race—showing a 24-vote swing and changing the outcome of the race by one vote—and posted that updated tally on the Secretary of State’s website. Consistent with other recounts conducted following the November 8, 2022 General Election, immediately following the announcement of the updated vote tally, Secretary of State recount officials continued working on the recount by conducting vote reconciliation. Reconciliation is the process of comparing the total number of ballots cast, the sum of votes cast plus undervotes and overvotes, and the number of voters checked in as having voted on Election Day. The purpose of reconciliation is to identify incomplete counts, mathematical errors, or other mistakes that indicate the vote tally is not accurate.¹

¹ Reconciliation is a routine and required part of Election Day vote counting. While preliminary, unofficial vote tallies are often announced by the moderator when reading the long tape from a ballot counting device and again after finishing hand counting ballots, the official, certified results are submitted after a reconciliation process to determine that the above listed categories are equivalent. Reflecting this standard practice of Election Day reconciliation—which is a safeguard against counting or tabulation errors—the

The total number of ballots cast, the sum of votes cast plus undervotes and overvotes, and the number of voters checked in as having voted on Election Day should be equivalent. Reconciliation showed that those numbers were not close to being equivalent in the Hillsborough District 16 race. Reconciliation paperwork showed the number of ballots counted was 23.5 lower than the number counted *of the same ballots from Manchester Ward 6* for the statutorily prescribed audit count of the governor's race, and 28.5 lower than for the Election Day records. *See* Plaintiffs' Exhibit E. This is clear evidence indicating a group of ballots was not counted during the Hillsborough District 16 race recount. Because the result includes a fraction, that also indicates an error in the counting process.²

Given that two candidates' vote totals fell by 18 and 22, the Secretary of State determined that it was likely that one stack of uncounted ballots—which are separated by the vote recipient—was inadvertently included in a stack of counted ballots. A failure to count all Election Day cast ballots necessarily means that the recount function was not concluded. Even if the unofficial vote tallies were announced, the recount could only be finished when all ballots in the race have been counted.

Given his constitutional duty to count all ballots, once reconciliation efforts indicated that the recount was incomplete, the Secretary of State noticed a continuation of that recount. Based on the reconciliation's indications, the initial procedure for continuing the recount will be:

Secretary of State adopted a reconciliation process as part of the regular conduct of 2022 General Election recounts.

² Without walking through the mathematical operations here from reconciliation calculations that would produce a half a ballot cast, a fraction could be produced based on inclusion of Federal Office Only ballots (where the voter would not cast a vote for state representative) in the total ballots cast number while not adequately accounting for under-votes in those races from those ballots.

- Complete an inventory of all ballots cast in Manchester Ward 6 (to confirm a number equivalent to that counted in the governor’s race audit count); and
- Then tally the ballots cast for the two candidates whose vote totals dropped significantly.

Secretary Scanlan believes that the uncounted ballots are most likely contained in the subset of ballots cast for those two candidates. If the universe of ballots is equivalent to the audit count, and if the vote totals increase as expected based on the likelihood of uncounted ballots finally being counted, then the Secretary will again reconcile the results to confirm that the recount has been completed by actually counting all ballots.

ARGUMENT

Here, the Secretary of State, a constitutional officer, is obligated to fulfill his sworn duty as the chief elections officer of this State and ensure that, in a race where a recount has been requested, all ballots cast are ballots counted. RSA 660:5 states that “...the ballots cast for such office **shall** be counted by the secretary of state” (emphasis added). An inadvertent error in a stage of that recount—an error that the Plaintiffs insist should suborn the will of the voters—precludes the Secretary from announcing a winner of that race, and instead obligates him to complete the recount accurately. RSA 660:5 continues with the obligation to suspend a recount until a discrepancy is resolved and then continue the recount.³ These obligations make clear what is intuitively obvious to a

³ 660:5 Conduct of Recount. – If directed by the secretary of state, the state police shall collect all ballots requested from the town or city clerks having custody of them and shall deliver them to the public facility designated by the secretary of state. At the time and place so appointed, the ballots cast for such office shall be counted by the secretary of state and such assistants as the secretary of state may require. When counting the ballots, the secretary of state or his or her assistants shall visually inspect each ballot. No mechanical, optical, or electronic device shall be used for the counting of ballots. The candidates, their counsel, and assistants shall have the right to inspect the ballots and participate in the recount under such suitable rules as the secretary of state may adopt. If the candidate requesting the recount cannot attend the recount, the candidate shall designate, in writing, to the secretary of state the name of an individual who will attend the

just mind: “The question to be decided is not whether some election officer has followed the requirements of the statute.... The issue is: What was the legally expressed choice of the voters?” *Nickerson v. Aimo*, 110 N.H. 348, 351 (1970), citing *Murchie v. Clifford*, 76 N.H. 99 (1911).

The recount statutes and the prohibition on second, third, or endless recounts has value to prohibit partisan gamesmanship and render an ordered end to the constitutionally necessary process of an election. Yet, the Secretary of State, a neutral constitutional officer whose obligation is to ensure that a recount captures the will of the people by accurately counting the ballots they cast, has a necessary interest and unique authority to conduct a recount until the ballots—all cast ballots—are accurately counted.

“Any candidate for whom a vote was cast for any office at a state general election may apply for a recount . . .” RSA 660:1. Only a candidate who received votes for an office can request a recount. No one else, including the Secretary of State, has authority to apply for a recount. The Secretary of State's continuation of the count is not a “recount.” Therefore, the statutory constraints on candidates seeking or obtaining a second recount are restrictions on a candidate seeking partisan advantage after a recount is fully completed, not on the Secretary of State completing his constitutional and statutory duties in a circumstance where he has determined that a recount has not been completed.

recount and who will be authorized to make decisions on the candidate's behalf. Each candidate or his or her counsel or designee shall have the right to protest the counting of or failure to count any ballot. The secretary of state shall thereupon rule on said ballot and shall attach thereto a memorandum stating such ruling and the name of the candidate making the protest. If, at any time during the counting of the ballots, a discrepancy appears in any ballot for any reason, the secretary of state shall suspend the recount until the discrepancy is resolved, at which time the secretary of state shall continue the recount. In no event shall a discrepancy result in a second recount for the same candidate, as provided in RSA 660:3.

It would be as unjust for an identified mistake in the administration of a recount to result in a false victory for a candidate as it would be for the Secretary of State to declare a winner of a recount who is not supported by a complete count of cast ballots. The Secretary of State announced unofficial results that were not complete. However, shortly thereafter, in continuing to engage in the recount process by verifying results through reconciliation, Secretary of State officials became aware that there was a high likelihood that not all ballots were counted and included in the unofficial results.

That is why it is entirely appropriate—and necessary—for the Secretary of State to continue counting ballots in the Hillsborough District 16 race. “As a means to the end of ascertaining the popular will, a statutory recount is simply a resort to the ballots, themselves, as the primary and best evidence of the result of the election.” *Opinion of the Justices*, 116 N.H. 756, 758 (1976). Overturning the will of the people based on an error that led to an inaccurate unofficial result would corrupt our constitutional processes and the right to free and fair elections. N.H. CONST. Part I, Art. 11. That is why our Supreme Court made clear the proper path in just pursuit of determining election outcomes: “In resolving election difficulties of this nature, care must be taken that the matter is not decided on the basis of unwarranted technicalities. The goal must be the ascertainment of the legally expressed choice of the voters.” *Opinion of the Justices*, at 759.

As stated earlier, the very purpose of a recount is to ascertain the popular will of the voters, avoid voter disenfranchisement, and ensure that an unwarranted technicality does not destroy the process. The State asserts that the Secretary of State, as a constitutional officer fulfilling his constitutional obligation consistent with the free and fair election right enshrined in Part I, Article 11, is entitled to continue counting ballots in

the Hillsborough District 16 race until all ballots cast by voters on Election Day are tallied and he is able to declare the winner of that race.

An inadvertent error—a gust of air scattering ballots, a stack of ballots being placed in the wrong location, a scrivener’s error in recording the final vote tally, or the wrong candidates being mistakenly listed on the Secretary’s website—should not corrupt the outcome of our democratic processes. Yet, that is exactly what the Plaintiffs insist is the just and necessary result here. The Plaintiffs are demanding to be awarded a result based on an error identified during the recount process and scheduled to be rectified during the recount period. While that insistence may be explained by the desire for partisan gain, it is not consistent with the demands of the New Hampshire Constitution. As such, the State is requesting that this Court permit the Secretary of State to continue the recount process and complete his constitutional obligation to count all votes in a recount.

Should this Court conclude that the Secretary’s continued counting of ballots to ensure all are counted is not within his powers by deeming his announcement of unofficial vote tallies a declaration under RSA 660:6 that terminates the recount—which the State adamantly disagrees is what occurred—the State requests equitable relief to correct this unwarranted technicality and allow the will of the voters to be determined in order to decide this race.

WHEREFORE, the Defendant respectfully requests that this honorable Court:

- (A) Deny Plaintiffs’ request for preliminary injunctive relief;
- (B) Deny Plaintiffs’ request for permanent injunctive relief;

- (C) Grant equitable relief should it be deemed necessary to complete the recount of all ballots in the Hillsborough District 16 race; and
- (D) Grant such further relief as may be deemed just and proper.

Respectfully submitted,

David M. Scanlan,

in his official capacity as the New
Hampshire Secretary of State

By his attorney,

John M. Formella
New Hampshire Attorney General

Date: November 20, 2022

By:

/s/ Myles Matteson

Myles B. Matteson, Bar No. 268059
Deputy General Counsel

Matthew Conley (NH Bar #268032)
Attorney

Anne M. Edwards (NH Bar #6826)
Associate Attorney General

New Hampshire Attorney General's Office
33 Capitol Street
Concord, NH 03301
Phone: (603) 271-3650
E-mail: myles.b.matteson@doj.nh.gov

CERTIFICATE OF SERVICE

I hereby certify that on November 20, 2022, a copy of the foregoing motion has served through electronic mail on all parties and counsel of record.

Date: November 20, 2022

/s/ Myles Matteson

Myles B. Matteson, Bar # 268059