

**THE STATE OF NEW HAMPSHIRE
SUPREME COURT**

NO. 2020-0518

ANNA CARRIGAN

v.

**STATE OF NEW HAMPSHIRE
DEPARTMENT OF HEALTH AND HUMAN SERVICES ET AL.**

**Appeal from Trial Court Decision on the Merits
Pursuant to New Hampshire Supreme Court Rule 7**

BRIEF OF ANNA CARRIGAN, APPELLANT

Respectfully submitted,

Anna Carrigan

By her Attorneys,

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TABLE OF CONTENTS

TABLE OF AUTHORITIES..... 3

QUESTIONS PRESENTED FOR REVIEW 4

LAWS AND RULES 5

STATEMENT OF THE CASE 6

STATEMENT OF THE FACTS..... 9

SUMMARY OF THE ARGUMENT 11

STANDARD OF REVIEW..... 12

ARGUMENT 13

I. Part I, Article 8 of the New Hampshire Constitution Demands
Accountability of Public Officers “At All Times,” Including
Through Lawsuits Initiated by Taxpayers..... 13

II. The Trial Court Erred in Denying Anna Standing to Challenge the
Illegality of the State’s Failure to Spend Funds on Abused and
Neglected Children Under Part I, Article 8..... 15

CONCLUSION..... 21

CERTIFICATE OF SERVICE 21

CERTIFICATION PURSUANT TO SUPREME COURT RULE 16(3)
..... 22

STATEMENT OF COMPLIANCE WITH WORD LIMITATION..... 22

TABLE OF AUTHORITIES

Cases

<i>Alward v. Johnson</i> , 171 N.H. 574 (2018).....	12
<i>Claremont School Dist. v. Governor</i> , 138 N.H. 183 (1993)	19
<i>Duncan v. State</i> , 166 N.H. 630 (2014)	17
<i>In re New Hampshire Div. for Children Youth and Families</i> , 155 N.H. 577 (2007).....	10
<i>New Hampshire Center for Public Interest Journalism v. New Hampshire Department of Justice</i> , No. 2019-0279, slip. op. (N.H. Oct. 20, 2020)...	12
<i>New Hampshire Health Care Ass’n v. Governor</i> , 161 N.H. 378 (2011)	16
<i>State v. Mack</i> , No. 2019-0171, slip. op. (N.H. Dec. 22, 2020)	12, 13

Statutes

RSA 169-C:2	5
RSA 169-C:29	19
RSA 169-C:32	19
RSA 169-C:34	19
RSA 169-C:38	19
RSA 169-C:39	19

Other Authorities

William A. Fletcher, <i>The Structure of Standing</i> , 98 YALE L. J. 221 (1988)	18
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Constitutional Provisions

N.H. Const. pt. I, art. 8	4, 5, 6, 7, 8, 13, 14, 15, 17, 18, 19
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QUESTIONS PRESENTED FOR REVIEW¹

Did the trial court err in denying standing to Anna Carrigan, a New Hampshire taxpayer and eligible voter, whose complaint sought declaratory relief against the State arising from the illegality of the State's response to child abuse and neglect, where Anna alleged standing to do so under Part I, Article 8 of the New Hampshire Constitution?

Preserved by Objection to Motion to Dismiss and Supporting Memorandum at APP000402-42.

¹ Citations to the record refer to the Appendix filed with this brief, using the abbreviation "APP" followed by the page or page range of the Appendix.

LAWS AND RULES

All power residing originally in, and being derived from, the people, all the magistrates and officers of government are their substitutes and agents, and at all times accountable to them. Government, therefore, should be open, accessible, accountable and responsive. To that end, the public's right of access to governmental proceedings and records shall not be unreasonably restricted. The public also has a right to an orderly, lawful, and accountable government. Therefore, any individual taxpayer eligible to vote in the State, shall have standing to petition the Superior Court to declare whether the State or political subdivision in which the taxpayer resides has spent, or has approved spending, public funds in violation of a law, ordinance, or constitutional provision. In such a case, the taxpayer shall not have to demonstrate that his or her personal rights were impaired or prejudiced beyond his or her status as a taxpayer. However, this right shall not apply when the challenged governmental action is the subject of a judicial or administrative decision from which there is a right of appeal by statute or otherwise by the parties to that proceeding.

Part I, Article 8, N.H. Constitution

I. It is the primary purpose of this chapter, through the mandatory reporting of suspected instances of child abuse or neglect, to provide protection to children whose life, health or welfare is endangered. The best interest of the child shall be the primary consideration of the court in all proceedings under this chapter.

II. It is a further purpose of this chapter to establish a judicial framework to protect the rights of all parties involved in the adjudication of child abuse or neglect cases. Each child coming within the provisions of this chapter shall receive, preferably in the child's own home, the care, emotional security, guidance, and control that will promote the child's best interest

N.H. RSA 169-C:2²

² The remainder of RSA 169-C is set forth in the appendix at APP000443-470

STATEMENT OF THE CASE

Anna Carrigan (“Anna”) filed a civil action in the Merrimack County Superior Court on February 7, 2020, seeking relief against numerous state public health officials and the New Hampshire Department of Health and Human Services (“DHHS”). APP000003.

Anna alleged that she suffered injuries as a public employee. She alleged that those injuries arose from retaliation visited upon her by other state actors in response to her public advocacy on behalf the victims of child abuse and neglect in New Hampshire. APP000003-6; APP000050-51.

Anna also sought declaratory relief from the State’s persistent failure to abide by its legal obligations to abused and neglected children. App. 000005-6; 000008-25. She alleged standing to do so arising out of Part I, Article 8, of the New Hampshire Constitution, which confers taxpayer standing on eligible voters. APP0000039-000048.

DHHS and its Commissioner (together the “State”) moved to dismiss Anna’s complaint on the ground that she lacked standing under Part I, Article 8 of the New Hampshire Constitution. App. 00392. The trial court (*Shulman, J.*) granted the State’s motion in a margin order, noting that

the remaining counts had been dismissed with prejudice by agreement.

APP000401.

The trial court's order states that the State's motion to dismiss was "Denied," before concluding, in contradictory fashion: "The plaintiff lacks standing to bring these claims." *Id.* The trial court further wrote:

As she concedes, the plaintiff does not have a personal interest in the outcome of the litigation beyond that of the community at large. Therefore, she does not have traditional standing. She also does not have standing under the 2018 amendment to Part 1, Article 8 of the N.H. Constitution [sic]. That constitutional [sic] provision grants taxpayers standing to petition the Superior Court for a declaration that the State or a political [sic] subdivision has spent (or has approved to spend) funds in violation of a law, ordinance or constitutional provision. In other words, taxpayers now have standing to complain in court that the public fisc is being tapped for an unlawful purpose. But plaintiff presents no such claim. She argues instead that the State is not spending enough--i.e. that the public fisc must be tapped further in order to achieve certain policy objectives. She also claims that what the State does spend should be reallocated as a matter of policy.

Nothing in the text of Article 8 suggests that it grants every taxpayer the right to seek a judicial determination of whether the government has sufficiently funded the programs that it runs. Such a reading would allow virtually every resident of the state to challenge as legally inadequate the funding level for virtually every line item in the State budget. This would be contrary to the plain, ordinary and objectively reasonable meaning of the words in Article 8 (i.e. the meaning that the voters would have understood when they made the amendment to Article 8 part of the basic law of this State).

Id.

Anna timely filed her appeal of the trial court's decision and this appeal followed. App. 000388.

STATEMENT OF THE FACTS

Anna is a New Hampshire taxpayer and is eligible to vote in New Hampshire. APP000006; APP000039. Through her complaint, she has brought to the judicial branch a record of illegality so dispiriting that state officials have declared, imploringly: **“Finally, the time has come to stop waiting for children to appear bruised and battered before we step in to help.”** App. 000021 (emphasis in original).

Anna’s complaint alleges that the State has failed to abide by its mandatory, substantive, and procedural obligations to respond to and protect children who are subject to this sort of child abuse and neglect, and worse. APP000040-48.

The State has not hired, trained, or supervised staff sufficient to respond to and assess reports of child abuse and neglect in New Hampshire. APP000040-48. The State does not pay staff a sufficient wage to permit the State to respond to and assess reports of child abuse and neglect. *Id.* The State thus cannot and does not meet its legal obligations to abused and neglected children. *Id.* Children have died or suffered grievous injury because of these failures. APP000016; APP000018; APP000022.

This state of illegality exists in New Hampshire because of, and despite, the extraordinary obligations the law imposes on all parties with respect to abused and neglected children. APP000008-000010. The law demands that all of us take on the responsibility of protecting children through mandatory reporting. *Id.* The law requires that this reporting trigger a response from the State that ensures that all children are protected from child abuse and neglect once a report is made. *Id.*

The reason the State has not met the substantive and procedural obligations the law demands is because the State does not spend enough to do so. APP000010. The State has not spent money on programs and people necessary to provide the mandatory services the law demands. APP000012-17; APP000022; APP000024-27; APP000315-323; *see also In re New Hampshire Div. for Children Youth and Families*, 155 N.H. 577, 584 (2007) (“DCYF argues that the commissioner of DHHS has authority to administer the budgets of DHHS and DCYF”).

The trial court’s order fails, in all respects, to acknowledge these facts and was in error.

SUMMARY OF THE ARGUMENT

On this record, the trial court erred when it dismissed Anna's lawsuit on the ground that she lacked standing. Part I, Article 8 of the New Hampshire Constitution demands government accountability. It confers special rights on the public to pursue accountability and legality from the government.

These rights include the right of standing granted to all taxpayers eligible to vote to seek judicial relief from illegal government spending. That right confirms that any taxpaying voter has standing to challenge the illegality of government spending regardless of whether he or she suffers personal injury.

Anna is a taxpayer and is an eligible voter. Her lawsuit alleges that the State does not spend enough to meet its legal obligations to the victims of child abuse and neglect. Her lawsuit alleges that the State's spending allocations, generally, cause the same set of failures.

Nothing about Anna's challenge makes it any less a case about illegal spending. As such, the trial court erred when it denied Anna standing under Part I, Article 8 and this Court should vacate, reverse, and remand the trial court's order.

STANDARD OF REVIEW

In reviewing the trial court's decision, this Court must accept the truth of the facts Anna alleged in the complaint, and it must draw all reasonable inferences in a manner most favorable to Anna. *Alward v. Johnson*, 171 N.H. 574, 581 (2018) (citations omitted); *see also New Hampshire Center for Public Interest Journalism v. New Hampshire Department of Justice*, No. 2019-0279, slip. op. at 2 (N.H. Oct. 20, 2020). Questions of constitutional interpretation and construction are, otherwise, questions of law subject to *de novo* review. *State v. Mack*, No. 2019-0171, slip. op. at 6 (N.H. Dec. 22, 2020) (citation omitted).

ARGUMENT

I. Part I, Article 8 of the New Hampshire Constitution Demands Accountability of Public Officers “At All Times,” Including Through Lawsuits Initiated by Taxpayers.

The only question raised in this appeal is whether the trial court erred in denying Anna standing as a taxpayer under Part I, Article 8 of the New Hampshire Constitution. In resolving this question, the Court must interpret and apply the text of Part I, Article 8, the ultimate source of constitutional meaning under our system of laws. *See Mack, supra.* at 6 (“The first resort is the natural significance of the words...”) (citation and internal quotation omitted).

Part I, Article 8, is unique among the constellation of state constitutional provisions in the United States. As amended in 2018, it now includes multiple components that have not been interpreted or applied by this or any Court.

The first sentence of Part I, Article 8, reaffirms the source of governmental “power” in New Hampshire. The source is “the people.” The provision does so to clarify that this “power” demands that “magistrates and officers” be “at all times accountable” to the people.

This text is the first indication that the New Hampshire Constitution takes an expansive view of the obligation of government officials to answer to the people, broadly, for their conduct. Part I, Article 8 does not say that this responsibility occurs “sometimes,” or at “convenient times for the government and courts,” or “at certain times before certain tribunals in certain circumstances.” The text states that these obligations exist at “all times.”

In determining the substance of what Part I, Article 8 requires, the next sentence of the provision provides that government “should be open, accessible, accountable and responsive.” Part I, Article 8 therefore mandates that the government make governmental proceedings accessible to the public in a manner that is not “unreasonably restrict[ive]”.

As amended in 2018, Part I, Article 8 now also provides that “the public . . . has a right to an orderly, lawful, and accountable government.” This substantive set of rights is conferred, not only on specific individuals who are injured, but upon the “public,” generally. In terms of the enforcement of these public rights, Part I, Article 8 states:

Therefore, any individual taxpayer eligible to vote in the State, shall have standing to petition the Superior Court to declare whether the State or political subdivision in which the taxpayer resides has spent, or has approved spending, public

funds in violation of a law, ordinance, or constitutional provision. In such a case, the taxpayer shall not have to demonstrate that his or her personal rights were impaired or prejudiced beyond his or her status as a taxpayer.

This enforcement provision is explicit regarding what courts may now require of the public seeking access to judicial relief against the government. Where a taxpayer challenges illegal state spending (or approval of spending), the taxpayer need not demonstrate personal injury and may seek judicial relief as one taxpayer among many thousands.

II. The Trial Court Erred in Denying Anna Standing to Challenge the Illegality of the State’s Failure to Spend Funds on Abused and Neglected Children Under Part I, Article 8.

Given the breadth and nature of the rights set forth under Part I, Article 8, the trial court erred in denying Anna standing under Part I, Article 8, in this case. The State’s motion to dismiss, and the trial court’s decision granting it, turned on the fact that Anna’s lawsuit challenged the State’s failure to spend money in amounts sufficient to meet its legal mandates to abused and neglected children.

A lawsuit challenging the State’s failure to spend money on mandated programs and procedures is no less a lawsuit over whether the State “has spent, or has approved spending, public funds,” than any other spending lawsuit. It is a lawsuit about public money that has exited the

State's treasury, or is approved by state officials to do so, in a manner that violates the law.

If a lawsuit alleges that the State has “not spent enough,” that does not mean that the lawsuit is any less about whether the lawsuit is about whether the State “has spent” funds legally in the first place. Such a lawsuit remains a lawsuit about spending. Indeed, the trial court acknowledged that Anna's case is about “spending” when it found that Anna “also claims that what the State *does spend* should be reallocated as a matter of public policy.” APP000401 (emphasis added). The trial court's decision to deny Anna standing therefore cannot be squared with its own conclusions about the nature of her lawsuit.

This Court, moreover, has equated the power to spend with the power to spend only insofar as spending is not wasteful. *See New Hampshire Health Care Ass'n v. Governor*, 161 N.H. 378, 389-90 (2011) (“The Governor's constitutionally vested spending power must include the exercise of discretion . . . to avoid wasteful expenditure. . . .”) (citations and internal quotations omitted). As a category, this Court thus has defined the constitutional power to spend, broadly, to include government spending at lesser, rather than greater, amounts. The trial court's decision to the

contrary conflicts with this Court’s interpretations of the term “spending” as a constitutional concept.

The trial court’s decision further rests on its replacement of constitutional text with its own colloquialisms. According to the trial court, “taxpayers now have standing to complain in court that the public fisc is being tapped for an unlawful purpose.” APP000041. This imprecise construction imports terms such as “public fisc” and “tapped” into the constitutional language of Part I, Article 8, though the text includes no such language. It also imports an unrecognized mental state requirement, “unlawful purpose,” into the provision, where voters did not approve such limitations.

The trial court engaged in this extratextual construction because it concluded that this is what the voters would have understood Part I, Article 8 to demand. That interpretation does not honor the breadth of the substantive right conferred by the public upon the public, through Part I, Article 8. Part I, Article 8 is a provision of the New Hampshire Constitution that secures for the public an unrestricted right to a lawful government, and government accountability, at “all times.”

New Hampshire voters expanded Part I, Article 8, to conscript the

judiciary further into this project in response to refusals by the judiciary to perform its fundamental role in determining governmental legality. *Cf. Duncan v. State*, 166 N.H. 630, 637-38 (2014) (outlining conflict between the judicial and legislative branch regarding the court’s heightened standing demands). The trial court’s decision, if affirmed, would subvert the purpose and intent of the voters, who expanded access to the judicial branch in the aftermath of a history of decisions by this Court refusing to permit access to taxpayers to challenge government illegality.

The trial court’s decision, narrowing the public’s rights, groundlessly concluded that the public would not have approved of Anna’s efforts to demand that victims of child abuse and neglect receive resources and attention from the government as mandated by law. In all respects, New Hampshire law indicates that the public does not accept this viewpoint.

Part I, Article 8 supplies “the public” with a new, substantive right, the constitutional right to pursue government legality on behalf of others. This general right complements the substantive and procedural rights the law recognizes within the domain of the law of child protection. *See* William A. Fletcher, *The Structure of Standing*, 98 YALE L. J. 221, 223-24

(1988) (standing under federal law depends on the nature of the substantive right at issue in any given case and is not a function of a generally applicable rule applicable to all cases).

There is, perhaps, no area of law that imposes greater legal demands upon both the public and the government to intervene on behalf of others than the law of child abuse and neglect. *See* RSA 169-C:29 (mandating that “any...person” report child abuse and neglect); RSA 169-C:32 (abrogating privileges with regard to mandatory reporting). In addition to imposing mandatory reporting obligations on all of us, state law requires an immediate government response. *See, e.g.*, RSA 169-C:34 (mandating the initiation of an investigation within no later than 72 hours of receiving a report); RSA 169-C:38 (requiring immediate response in certain acute cases). If people fail in their legal duties to children in this domain, they may be prosecuted, criminally. *See* RSA 169-C:39 (imposing misdemeanor liability).

The trial court’s conclusion that Part I, Article 8 does not provide Anna with the authority to seek relief on the grounds alleged in her complaint imports into Part I, Article 8 a series of selfish and self-centered norms that do not square with the substantive demands of the child

protection laws she invokes in her complaint. *Cf. Claremont School Dist. v. Governor*, 138 N.H. 183, 192 (1993) (“[H]aving identified that a duty exists and having suggested the nature of that duty, we emphasize the corresponding right of the citizens to its enforcement.”).

As such, the trial court’s decision was in error, constitutes an unwarranted and injurious narrowing of rights the people have secured for themselves, and is particularly harmful to New Hampshire’s children. It should be reversed and vacated.

CONCLUSION

For the reasons set forth above, this Court should reverse the trial court's ruling below and remand for proceedings consistent with its order. Counsel requests oral argument in this matter before a full panel of the Court, given the importance of the issues raised in this appeal.

Dated: February 9, 2021

Respectfully submitted,

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CERTIFICATE OF SERVICE

The foregoing brief has been provided to counsel of record by electronic filing.

Dated: February 9, 2021

/s/ Michael S. Lewis

Michael S. Lewis, Esquire

CERTIFICATION PURSUANT TO SUPREME COURT RULE 16(3)

I, Michael S. Lewis, hereby certify that the appealed decisions are in writing and are appended to this brief.

Dated: February 9, 2021

/s/ Michael S. Lewis
Michael S. Lewis, Esquire

STATEMENT OF COMPLIANCE WITH WORD LIMITATION

I, Michael S. Lewis, hereby certify that this brief contains a total of 3125 words and meets the requirement of 9,500 words or less for Appellant's Opening Brief.

Dated: February 9, 2021

/s/ Michael S. Lewis
Michael S. Lewis, Esquire

Certificate of Service

I hereby certify that a copy of the foregoing Motion to Dismiss was served on all counsel of record this 30th day of June, 2020, via the Court's electronic filing system.

/s/ Lawrence M. Edelman
Lawrence M. Edelman

11-9-2020. Denied. The plaintiff lacks standing to bring these claims. As she concedes, the plaintiff does not have a personal interest in the outcome of the litigation beyond that of the community at large. Therefore, she does not have traditional standing. She also does not have standing under the 2018 amendment to Part 1, Article 8 of the N.H. Constitution. That constitutional provision grants taxpayers standing to petition the Superior Court for a declaration that the State or a political subdivision has spent (or has approved to spend) funds in violation of a law, ordinance or constitutional provision. In other words, taxpayers now have standing to complain in court that the public fisc is being tapped for an unlawful purpose. But plaintiff presents no such claim. She argues instead that the State is not spending enough--i.e. that the public fisc must be tapped further in order to achieve certain policy objectives. She also claims that what the State does spend should be reallocated as a matter of policy. Nothing in the text of Article 8 suggests that it grants every taxpayer the right to seek a judicial determination of whether the government has sufficiently funded the programs that it runs. Such a reading would allow virtually every resident of the state to challenge as legally inadequate the funding level for virtually every line item in the State budget. This would be contrary to the plain, ordinary and objectively reasonable meaning of the words in Article 8 (i.e. the meaning that the voters would have understood when they made the amendment to Article 8 part of the basic law of this State).

COUNTS I and II are dismissed by virtue of this order. The remaining counts were dismissed with prejudice by agreement.

CASE DISMISSED.



Honorable Andrew R. Schulman

November 9, 2020