

**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**

REPLY BRIEF OF ANNA CARRIGAN, APPELLANT

Respectfully submitted,

Anna Carrigan

By her Attorneys,

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ARGUMENT

I. Introduction

Part I, Article 8, as amended by the People of New Hampshire (“People”) in 2018, adopts plain language. Its text mandates access, accountability, responsiveness, and legality from government. *See* App. Br. at 5 (quoting Part I, Article 8). It vests procedural rights in the public to demand these substantive rights, from government, through litigation in state courts. This feature of Part I, Article 8 received overwhelming support from the legislature, and from a supermajority of the voting public.

The question this case raises is whether this Court will repudiate the People and affirm the ungrammatical, contradictory, imprecise and erroneous margin order of the trial court dismissing her case. The further question is whether this Court will do so in a case where Anna, a taxpayer eligible to vote, has taken it upon herself to stand for the legal interests of New Hampshire’s abused and neglected children.

The State’s argument in support of the trial court’s order amounts to this: a suit about illegal state spending in the area of child abuse and neglect is not a suit about illegal state spending.

To support this argument, the State buries the language of Part I, Article 8 in a series of ahistorical arguments while failing to address the text of the provision in its entirety, the subject matter of Anna’s case, and the true source and nature of governmental power in New Hampshire: The People. This Court should reject the State’s argument and reverse remand this matter to the trial court for a litigation on the merits of the matters raised by Anna’s complaint.

II. The State's Brief Fails to Confront the Subject Matter of Anna's Complaint and Misstates the Nature of Her Allegations.

The State's brief ignores and misstates the subject matter of Anna's complaint. Anna alleges, among other things, that the State has violated, and is violating, New Hampshire's Child Protection Act, located at RSA 169-C ("The Act"). The Act imposes mandates upon Defendants to respond to child abuse and neglect. APP000008-9. The Act is not self-executing. APP00009-10. It requires government officials to meet the Act's demands. *Id.* If Defendants, all agents of the government, spent, or approved spending, no public funds on programs or personnel required to enforce the provisions of the Act, Defendants would fail to meet the legal mandates of the law, and so, act illegally.

Anna has alleged that the Defendants have spent, or have approved spending, some public funds, but that Defendants have failed to spend, or failed to approve spending public funds, at levels that comply with RSA 169-C and other legal mandates. APP000008-10; APP000040-41. The existence of a 2000-case backlog of mandatory reports of child abuse and neglect, under circumstances where Defendants are required to act to protect children immediately in response to such reports, is sufficient alone, when viewed against the mandates of the Act, to support Anna's case that the State is spending or approving spending public funds, illegally.

Indeed, if remanded to the trial court, Anna's case could boil down to an exchange in which state officials either confirm or deny the existence of a backlog of approximately 2000 cases over the periods of time covered by Anna's lawsuit. A follow-up exchange would then ask if the existence of such a backlog is caused by the State's spending decisions with respect

to its mandated child abuse and neglect responsibilities.

Under the State's construction of Part I, Article 8, this Court would prohibit a taxpayer like Anna from challenging this state of illegality. Such a construction would reward state executive branch officials who Anna alleges effectively have repealed the Act through spending decisions that render its provisions a nullity. *Cf.* N.H. Const. Part 2, Art. 90 ("All the laws which have heretofore been adopted, used, and approved, in the . . . state. . . shall remain and be in full force, until altered and repealed by the legislature..."). Such an outcome would fly in the face of the demands of Part I, Article 8. It also would encourage a construction of Part I, Article 8 at odds with a norm, so often expressed by so many associated with the judiciary, that ours is a system subject to the "rule of law."

III. The State's Brief Offers a Construction of Part I, Article 8 That is Not Consistent with the Text of the State Constitution.

The text of Part I, Article 8 is dispositive in this matter. Part I, Article 8, by its terms, confers standing upon Anna, a taxpayer eligible to vote, "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." Anna's suit does that. Anna alleges that the State "has spent, or has approved spending, public funds, in violation of" many laws, including the Act. Notwithstanding the State's arguments, a cause of action that alleges that the state "has spent . . . public funds," in insufficient amounts to meet legal mandates, is still a cause of action about whether the state "has spent . . . public funds . . . in violation of a law."

The State offers no sound argument to the contrary.

All of the State's arguments in favor of a construction that would deny Anna standing are extratextual and rest on arguments that draw improper inferences against the People. The State devotes pages and pages to authorities that are not the text of Part I, Article 8. These authorities express reasoning by this Court that the People repudiated through the constitutionally prescribed amendment process.

Indeed, the State concedes that Part I, Article 8 responded to the Court's decision to deny access to justice to taxpayer litigants in *Duncan v. State*, 166 N.H. 630 (2014). However, the State maintains that the Court should draw the inference that this remarkable, popular rebuke of judicial lawmaking in *Duncan* justifies a narrowing construction of Part I, Article 8, as amended. That argument ignores the ultimate source of constitutional law in New Hampshire. The source is the People, not the government, and not even the Court.

The text of our state constitution leaves no doubt about this principle. The first sentence of Part I, Article 8 provides: "All power residing originally in, and derived from the people, all the magistrates and officers of government are their substitutes and agents, and at all times accountable to them." This provision follows a similar statement within Part I, Article 7. That provision provides that "[t]he people of this state have the sole and exclusive right of governing themselves as a free, sovereign and independent state; and do, and forever hereafter shall, exercise and enjoy every power, jurisdiction, and right pertaining thereto [not otherwise in conflict with federal law]."

These portions of the state constitution reaffirm the standing of the

People to be heard, and not ignored or shunted to the side, by their government, including by the judiciary branch of the government.

So strong is the state constitutional commitment to a law grounded in the authority of the People, that Part I, Article 10 calls upon “the people,” and not “the government,” to “reform the old, or establish a new government,” “whenever the ends of government are perverted, and all other means of redress are ineffectual.” Part 2, Article 100, provides the constitutionally recognized mechanism for amending the state constitution short of the most extreme steps the People might take under Part I, Article 10. It is no light lift. Separately, the bicameral legislature must propose to the People an amendment to the state constitution upon the approval of three-fifths vote of the entire membership of each house. Then two-thirds of the voters must approve the amendment on the ballot. Part I, Article 8, as amended passed through this gauntlet.

The fact that Part I, Article 8 passed through this process in reaction to, and in repudiation of, this Court’s precedents regarding taxpayer standing, does not support the inference that Part I, Article 8 should be construed against the People and their rights, to accommodate those precedents. Instead, the fact that the People augmented Part I, Article 8, an article already devoted to the constitutional rights and standing of the People, to demand legality and openness from government, and standing to bring cases in state court as a means of securing these outcomes, should cause this Court to construe its provisions expansively with respect to the rights and standing of the People.

IV. The Trial Court's Margin Order Improperly Characterizes Taxpayers as a Disfavored Class of Litigants.

The trial court's decision denying Anna standing bears special mention for numerous reasons. The trial court's decision, and its decision-making process, treated Anna's efforts to obtain legality from government, as a disfavored activity. Anna's complaint is 52-pages long and heavily documented. APP00004. Anna defended her complaint from dismissal through substantial briefing. APP000307. The trial court failed to hold a hearing on the issue, though Anna requested one. APP000356.

Instead, the trial court issued a margin order that conveyed a contradictory holding, is a few paragraphs long, misspells the words "constitution," "constitutional" and "political," grafts text and standards upon Part I, Article 8 to limit its scope, all in the context of a case involving a novel question of state constitutional law involving the most fraught subject matter. Consider that, according to the trial court, Anna is part of a group that includes "any resident" who the trial court believes will file a claim asserting standing under Part I, Article 8. APP000401. "Any resident" is not a term described by Part I, Article 8. The "public" and the "individual taxpayer eligible to vote" are such terms. And Anna is one such person covered by each constitutional category.

At the foundation of this holding is the trial court's implied view that people (and People), like Anna, are to be feared because they challenge government illegality in court. Nothing about the text of Part I, Article 8, a legal monument to the concept that People can and should demand legality from their government, supports this attitude.

CONCLUSION

For the reasons set forth above and in the Appellant’s Brief, this Court should reverse the trial court’s ruling below and remand for proceedings consistent with its order.

Dated: April 15, 2021

Respectfully submitted,
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CERTIFICATE OF SERVICE

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

Dated: April 15, 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 were appended to the opening brief.

Dated: April 15, 2021

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

STATEMENT OF COMPLIANCE WITH WORD LIMITATION

I, Michael S. Lewis, hereby certify that this reply brief contains a total of 1686 words and meets the requirement of 3,000 words or less for Appellant's Reply Brief.

Dated: April 15, 2021

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