THE STATE OF NEW HAMPSHIRE

SUPREME COURT

Case No. 2021-0325

Daniel Richard

v.

Speaker of the House of Representatives &a.

Rule 7 Mandatory Appeal from the New Hampshire Superior Court, Merrimack County, Case No. 217-2021-CV-000178

OPPOSING BRIEF OF DEFENDANT/APPELLEE SPEAKER OF THE HOUSE OF REPRESENTATIVES

James S. Cianci, Esq. (NH Bar No. 14183)
House Legal Counsel
New Hampshire House of Representatives
Legislative Office Building Room 400
33 North State Street
Concord, NH 03301
(603) 271-3683
james.cianci@leg.state.nh.us

December 20, 2021

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ISSUE PRESENTED

Whether the trial court correctly found that the plaintiff had no right under Part I, Article 32 of the New Hampshire Constitution to have the New Hampshire General Court consider his remonstrance and properly dismissed the plaintiff's complaint on the merits and denied all forms of equitable relief.

STATEMENT OF THE FACTS AND THE CASE

The crux of the plaintiff's lawsuit concerns two separate "remonstrances" filed on three separate occasions with the New Hampshire Secretary of State, the Governor's office, and the Clerks of the House of Representatives and the Senate. Order at 2. The plaintiff contends that the legislature is required to act on his remonstrances. Plaintiff's Brief at 29. Notice of the remonstrances was published in the House Calendar on three separate occasions and were made available for inspection. Order at 2-3. The remonstrances were not formally introduced to the House; however, on the motion of a member, the body did consider the matter at the February 25, 2021 House session and, after a series of votes, ultimately voted to table the matter. Hearing Transcript at 11; *see also* House Journal 4 (February 25, 2021) at 33.[1]

The plaintiff subsequently filed a complaint on March 25, 2021 in Merrimack County Superior Court requesting writs of mandamus and prohibition, injunctive relief, and an order preventing future violation of plaintiff's due process rights. Order at 3. The court conducted a 45 minute hearing on April 30, 2021 on the defendants' motion to dismiss. Transcript at 1. On June 1, 2021 the court dismissed the plaintiffs' complaint on the

[1] Available at http://www.gencourt.state.nh.us/house/calendars_journals/viewer.aspx?fileName=Journals\2021\No%2004%20February%2025%202021.PDF

merits, Order at 12, and subsequently denied the plaintiff's motion for reconsideration. Order (June 22, 2021).

SUMMARY OF ARGUMENT

The trial court's order succinctly summarized the reason why this case was properly dismissed on the merits when it stated, "[T]he language, history, and common law interpretation of the right to seek redress of grievances in no way obliges the legislature to review or hold hearings on remonstrances." Order at 9-10.

The plaintiff is not entitled to the extraordinary, equitable relief sought against a coordinate branch of government for the performance of a discretionary act. The plaintiff has failed to establish either the apparent right to relief or the likelihood of success on the merits which would warrant a writ of mandamus, writ of prohibition, or an injunction.

A comprehensive survey of the substantive law of petition and remonstrance, under both federal and state law, consistently refutes the plaintiff's view of the nature of the right under the New Hampshire Constitution. No court has held that a legislative body must act on a citizen's petition and nothing in the plain language or history of Pt. I Art. 32 would indicate that this court should reach a different result. To the extent that the plaintiff suggests that certain scholarship supports a contrary view, such historical antecedents are not persuasive.

Finally, the plaintiff's due process arguments may be summarily dismissed in light of the failure to establish a substantive or procedural right under Pt. I Art. 32.

ARGUMENT

I. Standard of Review

In reviewing a trial court's grant of a motion to dismiss, this court considers "whether the allegations in the plaintiff's pleadings are reasonably susceptible of a construction that would permit recovery." *Clark v. N.H. Dep't of Emp't Sec.*, 171 N.H. 639, 645 (2019) (citations omitted). The court will "assume the plaintiff's pleadings to be true and construe all reasonable inferences in the light most favorable" to him or her; however, it "need not assume the truth of statements in the plaintiff's pleadings that are merely conclusions of law." *Id*. The court will then "engage in a threshold inquiry that tests the facts in the complaint against the applicable law." *Id*. Finally, the court "will uphold the trial court's grant of a motion to dismiss if the facts pleaded do not constitute a basis for legal relief." *Id*. For the reasons stated below, this court may properly conclude that the plaintiff has not established a basis for relief and should affirm the trial court's order dismissing the action.

II. The plaintiff is not entitled to the extraordinary relief sought from the Judiciary against a coordinate branch of government.

Mandamus and prohibition are "extraordinary" writs. *Petition of CIGNA Healthcare*, 146 N.H. 683, 687 (2001) (citations omitted). "A writ of mandamus is used to compel a public official to perform a ministerial act that the official has refused to perform, or to vacate the result of a public official's act that was performed arbitrarily or in bad faith." *Id*. "When an official is given discretion to decide how to resolve an issue before him, a mandamus order may require him to address the issue, but it cannot require a particular result." *Rockhouse Mtn. Prop. Owners Ass'n v. Town of Conway*, 127 N.H. 593, 602 (1986). The court may issue a writ of mandamus, at its discretion, "only where the petitioner has an apparent right to the requested relief and no other remedy will fully and adequately

afford relief." *Petition of CIGNA Healthcare*, 146 N.H. at 687; *see also Guarracino v. Beaudry*, 118 N.H. 435, 437 (1978) (mandamus "should be restricted to the amelioration of exigent circumstances, the correction of a plain legal error by the government"). A writ of prohibition is used "to prevent subordinate courts or other tribunals, officers or persons from usurping or exercising jurisdiction with which they are not vested." *Hillsborough v. Superior Court*, 109 N.H. 333, 334 (1969). The court exercises its discretionary power to issue such writs "with caution and forbearance and then only when the right to relief is clear." *Id*.

Part I, Article 32 does not establish a ministerial or mandatory right or duty to be performed by the defendant which would permit the extraordinary writs of mandamus or prohibition. "A ministerial duty . . . is one in respect to which nothing is left to discretion. It is a simple, definite duty, arising under conditions admitted or proved to exist, and imposed by law." *Mississippi v. Johnson*, 71 U.S. 475, 498 (1866). By their very nature, ministerial acts are executive, not legislative, in nature: "A writ of mandamus will not issue to a legislative body or its officers to require the performance of duties that are purely legislative in character and over which such legislative bodies have exclusive control." *State ex rel. Grendell v. Davidson*, 716 N.E.2d 704, 709 (Ohio 1999); *see also Lamson v. Secretary of Com.*, 168 N.E. 2d 480, 484 (Mass. 1960) ("Mandamus **of course** does not lie against the Legislature.") (emphasis added); *LIMITS v. President of the Senate*, 604 N.E.2d 1307, 1309-1310 (Mass. 1992) ("[C]ourts should be most hesitant in instructing the General Court when and how to perform its constitutional duties . . . the only remedy may come from the influence of public opinion, expressed ultimately at the ballot box.").

In the absence of any ministerial duty to be performed by the defendant, this court should be counseled by Part I, Article 37's separation

of powers considerations and refrain from imposing a remedy for a purely discretionary function. Part I, Article 32 does not establish a mandatory duty on the legislature which this court may enforce through mandamus or prohibition and as will be shown in the next section, the trial court found that the plaintiff has no apparent right to the requested relief. Simply put, there is nothing which the court may order the legislature to do with the plaintiff's remonstrance.

The plaintiff is also not entitled to injunctive relief in this case. Here, where the plaintiff has requested both mandamus and an injunction, he does not "fare any better by asking in the alternative for injunctive relief, there being no substantial distinction between mandamus and a mandatory injunction directing the performance of official public duties." *Guy J. v. Commissioner*, 131 N.H. 742, 747 (1989). The issuance of an injunction is also an "extraordinary remedy". *N.H. Dep't of Envtl. Servs. v. Mottolo*, 155 N.H. 57, 63 (2007). An injunction should not issue unless there is an immediate danger of irreparable harm to the party seeking injunctive relief, and there is no adequate remedy at law . . .[and] a party seeking an injunction must show that it would likely succeed on the merits." *Id.* It is within the trial court's sound discretion to grant an injunction after consideration of the facts and established principles of equity. *Id.*

Having failed to satisfy the legal standard for the issuance of a writ of mandamus or prohibition, the trial court properly found that the plaintiff likewise failed to meet the standard for an injunction, there being no likelihood of success on the merits. Accordingly, this court should uphold the trial court's denial of injunctive relief.

III. The substantive federal and state law regarding petition and remonstrance is consistently contrary to the plaintiff's position and does not support any basis for judicial relief.

The right of petition and remonstrance expressed in Part I, Art. 32 of the New Hampshire Constitution provides that, "The People have a right, in an orderly and peaceable manner, to assemble and consult upon the common good, give instructions to their Representatives, and to request of the legislative body, by way of petition or remonstrance, redress of the wrongs done them, and of the grievances they suffer." *See also* N.H. Const. Pt. I, Art. 31 (Legislature "shall assemble for the redress of public grievances").

This court has not had significant occasion to examine the nature of the right of petition to the legislature contained in Pt. Art. 32; however, it has previously observed that "the legislature is not organized to determine the merits of such claims and the time consumed in their consideration adds materially to the legislative costs." *Sousa v. State*, 115 N.H. 340, 344 (1975) (citation and internal quotation omitted). As such, the court has held that, in interpreting Pt. I, Art. 32, it would, "rely upon federal cases interpreting the First Amendment to the Federal Constitution for guidance." *Opinion of the Justices (Voting Age in Primary Elections II),* 158 N.H. 661, 667 (2009). As shown in the next section, no federal case supports a claim that a legislative body or other government policymaker is required to take action on a citizen's petition or remonstrance.

A. United States Supreme Court precedent interpreting the First Amendment right to petition the government for a redress of grievances is squarely opposed to plaintiff's position.

In *Minnesota State Bd. for Community Colleges v. Knight*, 465 U.S. 271 (1984), the Supreme Court held that "[t]he Constitution does not grant to members of the public generally a right to be heard by public bodies making decisions of policy." *Id.* at 283. The Court found:

> Policymaking organs in our system of government have never operated under a constitutional constraint requiring them to afford every interested member of the public an opportunity to present

> testimony before any policy is adopted. Legislatures throughout the nation, including Congress, frequently enact bills on which no hearings have been held or on which testimony has been received from only a select group. Executive agencies likewise make policy decisions of widespread application without permitting unrestricted public testimony. Public officials at all levels of government daily make policy decisions based only on the advice they decide they need and choose to hear. To recognize a constitutional right to participate directly in government policymaking would work a revolution in existing government practices.

Id. at 284. The court therefore held that members of the public have no constitutional right to a government audience for their policy views. *Id.* at 286. "However wise or practicable various levels of public participation in various kinds of policy decisions may be, this Court has never held, and nothing in the Constitution suggests it should hold, that government must provide for such participation . . . Nothing in the First Amendment or in this Court's case law interpreting it suggests that the rights to speak, associate, and petition require government policymakers to listen or respond to individuals' communications on public issues." *Id*. at 285; *see also Smith v. Arkansas State Highway Emp., Local 1315,* 441 U.S. 463, 464-65 (1979) (First Amendment does not impose any affirmative obligation on the government to listen to or respond to citizen complaints); *Bi-Metallic Inv. Co. v. State Bd. of Equalization*, 239 U.S. 441 (1915) (rejecting 14th Amendment due process claim that members of the public have a right to be heard by public bodies).

The same logic applies to the present case. The plaintiff – and any other citizen – has the opportunity to present a grievance to the legislature, but there is no constitutional mandate to consider it or act on it. Further, the constitution does not mandate a direct role for citizens to act on their petitions to their elected officials or to require the legislature to hear them.

Nothing in the United States Supreme Court's First Amendment jurisprudence would indicate a different result in the present case.

B. Plaintiff's argument finds no additional support in state courts' interpretation of state constitutional provisions relating to the right of petition and remonstrance.

A recent Tennessee case, *Gentry v. Former Speaker of the House Glen Casada*, 2020 WL 5587720 (Tenn. Ct. App. 2020), cert. denied, 141 S. Ct. 2804 (2021), is particularly instructive to this court because it involved a nearly identical set of facts, a similar remedy sought, and a comprehensive survey of the applicable law. In that case, the plaintiff filed a remonstrance with the Tennessee General Assembly and subsequently filed a writ of mandamus in chancery court seeking to have the court order the legislature to hear and consider the remonstrance. *Id*. at *1. Turning to the issue at hand, the court stated, "Mr. Gentry asks this court to determine whether the right of petition includes the right to have the legislature hear or consider his petition. This question has been answered in the negative by the United States Supreme Court." *Id*. at *3, citing *Smith v. Arkansas State Highway Emp., Local 1315,* 441 U.S. 463 (1979) and *Minnesota State Bd. for Community Colleges v. Knight*, 465 U.S. 271 (1984).

The court then examined the relevant state jurisprudence regarding petition and remonstrance and found that the plaintiff did not have a clearly established right to have the petition heard or considered by the legislature, particularly in light of the legislature's constitutional authority to establish its own rules of proceeding. *Id*. at *4-5. *See also Courtyard Manor Homeowners' Ass'n, Inc. v. City of Pelham*, 295 So.3d 1061, 1064-1065 (Ala. 2019) (state constitution's right of petition does not require legislative body to accept or reject citizens' proposed legislative initiative); *Richards Furniture Corp. v. Board of County Commissioners of Anne Arundel County*, 196 A.2d 621, 623-625 (Md. Ct. App. 1964) (constitutional

provision relating to redress of grievances does not require that a hearing be held by legislature); *Piekarski v. Smith*, 153 A.2d 587, 592 (Del. 1959) (right of petition limited to right to present a petition or remonstrance setting forth a protest or grievance but does not include the right to debate in person or through counsel the subject matter of the remonstrance).

The single state case cited by the plaintiff for the potential of a broader nature of the right to remonstrance, *Professional Association of College Educators v. El Paso County Community District*, 678 S.W.2d 94 (Tex. App. El Paso 1984), in fact only went so far as to propose the following:

> We find no requirement that those trusted with the powers of government must negotiate or even respond to complaints filed by those being governed. But, surely, they must stop, look and listen. They must consider the petition, address or remonstrance. If the response, or lack thereof, is not as desired, the remedy then lies in the ballot box where free and independent people ultimately deal with those who rule over them.

Id. at 96-97. However, nothing in that case suggests that a remonstrance must be formally introduced and acted upon by a legislative body.

The trial court effectively summarized the nature of the right to petition and remonstrance when it stated:

> Article 32 means what it says: citizens have a right to request redress and list their grievances. It makes no mention of legislative review or hearings. Nor does Article 31 require such procedures . . . it does not explicitly require that the legislature review or conduct hearings on individual grievances.

Order at 8. This court should be guided by the consistent federal and state precedent and reach the same conclusion.

IV. Plaintiff's appeal to history and scholarship is unavailing.

In the absence of any legal support for the plaintiff's view of the nature of the right of remonstrance under Pt. Art. 32, the plaintiff has

presented this court with numerous historical examples as well as selected scholarly articles which purport to buttress plaintiff's position. This court should give little weight to these arguments. At its core, the plaintiff's request in this case urges this court to turn back the clock and have the New Hampshire General Court adopt a role that predates this court's seminal decision of *Merrill v. Sherburne*, 1 N.H. 199 (1818). The plaintiff's position would have this court disregard over 200 years of well-established precedent regarding the proper roles of the Legislature and Judiciary and require the General Court to essentially receive, hear, and adjudicate every citizen's petition for redress or remonstrance. But nothing in the plaintiff's argument warrants this court overruling the principles established in *Merrill*, *see N.H. Democratic Party v. Sec'y of State*, 174 N.H. 312, 2021 WL 2763651 at *8 (2021) (explaining doctrine of stare decisis and outlining factors informing court's decision to overrule precedent), nor require the legislature to assume a role to which this court has observed it is not equipped. *See Sousa v. State*, 115 N.H. 340, 344 (1975).

The plaintiff's historical view of Pt. I, Art. 32 would also mandate a form of direct democracy which does not exist in this state's or country's experience in the manner in which the plaintiff proposes. *Minnesota State Bd. for Community Colleges v. Knight*, 465 U.S. 271, 284 (1984) ("To recognize a constitutional right to participate directly in government policymaking would work a revolution in existing government practices.") The United States Supreme Court has soundly rejected the notion that citizens have the right to give "legally binding" nonadvisory instructions to their elected representatives, *see Cook v. Gralike*, 531 U.S. 510, 520-21 (2001). Requiring the General Court to consider every matter presented to it and to require a citizen's direct participation would subvert this principle.

Finally, the plaintiff's reliance on selective scholarly articles and historical treatises is not dispositive. A survey of the literature leads to a

decidedly mixed conclusion which does not support judicial intervention. *See We The People Foundation, Inc. v. U.S.*, 485 F.3d 140, 144-145 (D.C.Cir. 2007) (reviewing the scholarship, as well as binding Supreme Court precedent, to conclude that "Executive and Legislative responses to and consideration of petitions are entrusted to the discretion of those Branches.")

The plaintiff's historical and scholarly arguments are unpersuasive. Given the uniform array of federal and state law contrary to the plaintiff's position, such arguments offer no justification for this court to reach a different conclusion.

V. The nature of the right under Pt. I Art. 32 does not support the plaintiff's undeveloped due process claims.

The trial court noted that the plaintiff "raise[d] due process concerns in passing" without specifying whether they were procedural or substantive or state or federal in nature. Order at 10. After careful analysis under Part I, Article 15 of the New Hampshire Constitution, the court nevertheless dismissed all such claims. *Id*. This court's policy of "deciding issues under the State Constitution before turning to the Federal Constitution is well-established. *See State v. Ball*, 124 N.H. 226, 232, 471 A.2d 347 (1983). However, off-hand invocations of the State Constitution that are supported by neither argument nor authority warrant no consideration." *State v. Barr*, 172 N.H. 681, 685 (2019). This court should therefore uphold the trial court's ruling.

There are two types of due process: procedural and substantive. *State v. Furoal*, 161 N.H. 206, 213-14 (2010). In addressing procedural due process claims, the court engages in a two-part analysis: "first, we determine whether the individual has an interest that entitles him or her to due process protection; and second, if such an interest exists, we determine what process is due." *Appeal of Mullen*, 169 N.H. 392, 397 (2016) (citation

and internal quotation omitted). Conversely, substantive due process "provides heightened protection against government interference with certain fundamental rights and liberty interests." *State v. Hollenbeck*, 164 N.H. 154, 159 (2012). If there is no fundamental right or protected liberty interest at stake, the court reviews "the infringement of a right or interest under our rational basis standard of review, which provides that a statute is constitutional if it is rationally related to a legitimate governmental interest." *Id*.

The trial court properly concluded that the defendant did not violate the plaintiff's due process rights. Order at 11. As shown in the previous section, the plaintiff has no substantive or procedural right under Pt. I, Art. 32 to have the remonstrances considered by the legislature. The plaintiff has fully exercised his rights by delivering his remonstrances to the legislature on multiple occasions. The plaintiff also has the ability to present his remonstrance to individual legislators who may decide to draft and introduce legislation related to the issues contained therein and would also have the ability to testify on any bill, propose ideas for amendments, or provide further information. As such, this court may conclude that his due process rights have not been violated. *See also Bi-Metallic Inv. Co. v. State Bd. of Equalization*, supra.

CONCLUSION

For the foregoing reasons, the defendant respectfully requests that this court should affirm the trial court's order dismissing this case on the merits and deny all forms of relief.

Respectfully submitted,
SPEAKER OF THE HOUSE OF REPRESENTATIVES
By his attorney,

December 20, 2021 /s/ James S. Cianci

James S. Cianci, Esq. (NH Bar No. 14183)
House Legal Counsel
New Hampshire House of Representatives
Legislative Office Building Room 400
33 North State Street
Concord, NH 03301
(603) 271-3683
james.cianci@leg.state.nh.us

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was sent to all parties and counsel of record pursuant to the Judicial Branch's e-filing system.

December 20, 2021 /s/ James S. Cianci
James S. Cianci, Esq.

CERTIFICATE OF COMPLIANCE

I hereby certify that pursuant to Supreme Court Rule 16(11) this brief contains approximately 4,456 words. I have relied on the word count of the computer program used to prepare this brief.

December 20, 2021 /s/ James S. Cianci
James S. Cianci, Esq.