THE STATE OF NEW HAMPSHIRE
SUPREME COURT

Docket No. 2023-0097

Daniel Richard

v.

Governor Christopher Sununu, et al.

BRIEF FOR THE SECRETARY OF STATE AND THE STATE OF NEW HAMPSHIRE

THE NEW HAMPSHIRE SECRETARY OF STATE AND
THE STATE OF NEW HAMPSHIRE

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(Oral argument not requested)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Constitutional Provisions

QUESTIONS PRESENTED FOR REVIEW

Did the trial court correctly dismiss the plaintiff's claims for failing to state a claim for which relief could be granted?

STATEMENT OF THE CASE AND FACTS

The plaintiff is a resident of Auburn, New Hampshire. SA 56.[1] On February 24, 2022, he served a "remonstrance" upon multiple government officials including Secretary of State David Scanlon, Attorney General John Formella, and the Office of Governor Christopher Sununu to notify them of his "serious concerns and lack of trust over the use of election voting machines[]" and the "legal issues surrounding the use of electronic voting machines[]". SA 58. The plaintiff delivered a copy of this remonstrance to the tax collector of Auburn on March 7. *Id*.

On March 9, the plaintiff checked in with the Auburn Supervisor of the Checklist and was given a ballot before he asked where the hand counting deposit box was so that he could have his vote hand counted. *Id*. The Auburn moderator informed the plaintiff that the voting machines would be used to count ballots despite his remonstrance. SA 59. The plaintiff did not allege that he was ever informed that his vote would not be counted or that he was not permitted to vote. *See generally* SA 49-95. The trial court ultimately found that the plaintiff was able to have his ballot hand counted and that his claim that he had been denied the right to vote was moot. SA 16.

On August 22, 2022, the plaintiff filed a complaint in Rockingham Superior Court. SA 49, 95. He alleged six claims arising under the New Hampshire Constitution and the United States Constitution:

Count 1: Plaintiff was denied the right to vote.

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[1] References to the records are as follows: "PB" refers to the plaintiff's brief and page number. "PA" refers to the separate appendix filed with the plaintiff's brief. "HT" refers to the hearing transcript and page number. "SA" refers to the appendix filed with this brief and page number.

> Count 2: Plaintiff was deprived of his substantive and procedural due process rights which required to change, who and how the votes are sorted and counted.
>
> Count 3: No constitutional authority or standard for testing or certifying electronic voting machines.
>
> Count 4: Changing definition of a qualified voter by statute.
>
> Count 5: Expanding the exemptions for absentee voting with out the consent of the inhabitants
>
> Count 6: Constitutional amendment, violation of Procedural due process to amend the Constitution. There was no written disclosure to the voter, therefore no consent of the inhabitants.

SA 55.

On August 31, the plaintiff filed an *ex parte* motion for emergency injunctive relief which the trial court denied. SA 19-20. The trial court scheduled for a preliminary hearing for September 9. SA 23-26. On September 7, the plaintiff filed an emergency motion to allow for expert testimony, specifically the testimony of Wayne P. Saya. SA 104-06. The defendants received Mr. Saya's report on that same date. SA 107-124. The defendants objected to the motion for expert testimony on September 8. SA 125-129. The defendants filed a further objection to the plaintiff's motion for preliminary injunction on September 9. SA 130-39. At the September 9 hearing, the trial court denied the plaintiff's motion to allow for expert testimony, but did allow him to submit Mr. Saya's written report into

evidence. SA 143. At that hearing, the trial court permitted the plaintiff to call three witnesses and submit exhibits. HT 12, 15, 20, 25, 30.

On September 9, the plaintiff filed a motion to reconsider the trial court's refusal to hear expert testimony regarding the preliminary injunction. PA 73. On September 12, the trial court issued a written order denying the plaintiff's motion for preliminary injunction. SA 140-41. On September 26, the trial court denied the plaintiff's motion to reconsider. SA 142-43.

On October 3, the defendants filed a motion to dismiss the plaintiff's complaint for failure to state a claim upon which relief could be granted and for the plaintiff's lack of standing. SA 150-72. On November 9, the plaintiff filed a motion to amend his complaint removing a claim regarding the safety and efficacy of ballot counting devices; removing a "criminal complaint against the by [sic] public officials[]"; and removing members of the General Court, the Speaker of the House, and the Senate President as defendants. SA 173-75.

On November 10, the trial court issued a thorough, well-reasoned, 16-page written order granting the defendant's motion to dismiss. SA 3-18.[2] In that order, the trial court found that the plaintiff "ha[d] failed to state a claim upon which relief may be granted" and declined to address the defendants' standing argument. SA 5-6. The trial court further ordered that the plaintiff's motion to amend was moot. SA 173. On December 12, 2022,

[2] The defendants note that the plaintiff did not attach or append to the notice of appeal, his brief, or his appendix the decision below and the clerk's written notice of the decision below as required by Supreme Court Rule 7.

the plaintiff filed a motion to reconsider which the trial court subsequently denied on January 19, 2023. SA 195-98.

This appeal followed.

SUMMARY OF THE ARGUMENT

The plaintiff has either waived or not properly preserved most of his claims for this Court's review. Nor did the plaintiff adequately brief the claims in his notice of appeal or develop those claims for this court's review. This Court will not review "laundry lists" of undeveloped claims. *Halifax-American Energy Co. v. Provider Power LLC*, 170 N.H. 569, 574 (2018). For this reason alone, the trial court's dismissal of the plaintiff's complaint should be affirmed. To the extent that this Court does substantively review the listed claims, the Plaintiff has not carried his "burden of demonstrating reversible error." *Gallo v. Traina*, 166 N.H. 737, 739 (2014).

In his notice of appeal, the plaintiff appears to argue that he was denied due process because the trial court dismissed his complaint rather than submit this matter to a jury, did not hold a hearing on the merits, and did not agree with the plaintiff's legal arguments. *See* NOA at 3. To the contrary, the trial court properly dismissed the plaintiff's complaint in accordance with Superior Court Rule 9 because the plaintiff failed to state a claim for which relief could be granted. In doing so, the trial court held a preliminary hearing, afforded the plaintiff an opportunity to object to the defendants' motion to dismiss, and issued a lengthy, well-reasoned order that considered the plaintiff's arguments and allegations before ruling that the plaintiff failed to state a claim for relief.

Although he did not directly raise the following arguments in his notice of appeal, the Plaintiff appears to argue in his brief that: (1) the 1976 Amendments are repugnant and contrary to the State Constitution, (2)

ballot counting devices are being unconstitutionally used in New Hampshire, (3) the Legislature has illegally expanded absentee voting, and (4) the Legislature has illegally expanded the definition of qualified voter. *See* PB 17, 24, 27, 33. The Plaintiff has not carried his burden of proving that any of these arguments constitutes reversible error.

First, the plaintiff appears to argue that the 1976 Amendments were not lawfully passed and, if they were, they are contrary or repugnant to the State Constitution. The 1976 Amendments were lawfully passed and made a number of changes that clarified critical points of election law pursuant to the will of New Hampshire voters. This Court has only intervened in the passage of a Constitutional amendment where there is a divergence between "the language which [the voters] ratified and adopted" and "the effect of the amendments…which the Legislature proposed." *Gerber v. King*, 107 N.H. 495, 499 (1967). The trial court correctly found that there was no divergence between the language of the 1976 Amendments and the effect of those amendments.

Second, the plaintiff appears to argue that the New Hampshire Constitution prohibits the State from using ballot counting devices. But the Constitution does not require that ballots be counted by hand. *See* N.H. Const. pt. II, Art. 32. As the Legislature has the authority to create "laws, statutes, ordinances, directions, and instructions, either with penalties or without, so as the same be not repugnant or contrary to this constitution, as they may judge for the benefit and welfare of this state," the Legislature is well within its authority to allow for the use of ballot counting devices. N.H. Const. pt. II, Art. 5.

Third, the plaintiff appears to argue that the Ballot Law Commission constitutes an unlawful delegation of the Legislature's authority. The plaintiff does not appear to dispute that the Legislature has the authority to regulate the procedure for elections. To that end, the Legislature authorized municipalities to use ballot counting devices that the Ballot Law Commission has approved. The Legislature lawfully created the Ballot Law Commission and lawfully delegated it to the task of approving ballot counting devices as set forth in RSA 656:40 *et seq*. The Plaintiff's arguments otherwise lack merit.

Fourth, the Plaintiff appears to argue that the Legislature impermissibly expanded the definition of "qualified voter" and the circumstances under which qualified voters can vote absentee. Part I, Article 11 of the State Constitution requires the Legislature to establish "law[s] for voting by qualified voters" who are "absent" from their municipality on the date of an election or who "by reason of physical disability are unable to vote in person." It further obligates the Legislature to make polling places "easily accessible" to all qualified voters. The Legislature property implemented those constitutional directives when it passed RSA 21:6, RSA 21:6-a, RSA Chapter 657, and RSA 656:40-:42. The trial court therefore properly ruled that the plaintiff's arguments fail to state claims for relief, and the plaintiff has not demonstrated how the trial court's decision constitutes reversible error.

Fifth, the plaintiff appears to argue that he was denied the right to vote because the plaintiff did not want to submit his ballot into a ballot counting device. In effect, the plaintiff asserts that he has a right to vote in the manner of his choice. Part I, Article 11 does not grant qualified voters

the right to vote in the manner of their choosing or the right to refuse to comply with voting procedures that apply equally to other qualified voters in the municipality. Rather, the Legislature may properly regulate the procedures for holding elections, so long as those procedures do not deprive qualified voters of an "equal right to vote." Like all qualified voters in Auburn, the plaintiff received a ballot and had an opportunity to place his completed ballot in a ballot counting device—which is the same procedure that applies to all other voters in the Town. Therefore, the trial court correctly ruled that the plaintiff failed to state a claim that his right to vote had been violated.

Accordingly, the trial court correctly dismissed the plaintiff's complaint as presenting no claim for which relief could be granted. Its decision should be affirmed.

ARGUMENT

I. STANDARD OF REVIEW

"In reviewing a motion to dismiss for failure to for failure to state a claim, [the Court] assume[s] the truth of the facts alleged by the plaintiff and construe[s] all reasonable inferences in the light most favorable to the plaintiff." *Sivalingam v. Newton*, 174 N.H. 489, 493-94 (2021). The Court "need not, however, assume the truth of statements in the plaintiff's pleadings that are conclusions of law." *Id.* (citing *Clark v. N.H. Dep't of Emp't Sec.*, 171 N.H. 639 (2019)). "In conducting this inquiry, [the Court] may consider documents attached to the plaintiff's pleadings, documents the authenticity of which are not disputed by the parties, official public records, or documents sufficiently referred to in the complaint." *Id.* (citing *Automated Transactions v. Am. Bankers Ass'n*, 172 N.H. 528, 532 (2019)). "If the facts do not constitute a basis for legal relief, [the New Hampshire Supreme Court] will uphold the granting of the motion to dismiss." *Graves v. Estabrook*, 149 N.H. 202, 203 (2003) (citation omitted).

Arguments that are brought before this Court must be properly preserved for review. Complaints that are brought before this Court must be fully briefed and "a mere laundry list of complaints regarding adverse rulings by the trial court, without developed legal argument, is insufficient to warrant judicial review." *Halifax American Energy Co. v. Provider Power LLC*, 170 N.H. 569, 574 (2018). (quotation omitted). Finally, "an argument that is not raised in a party's notice of appeal is not preserved for appellate review." *Id.*

The appealing party has "the burden of demonstrating reversible error." *Gallo v. Traina*, 166 N.H. 737, 739 (2014). Where the appealing party fails to carry this burden, this Court will affirm the trial court. *Id*.

II. THE PLAINTIFF'S ARGUMENTS HAVE NOT BEEN PRESERVED FOR REVIEW.

The plaintiff raises a "laundry list of complaints" regarding the trial court's rulings that are either waived or not properly preserved before this court.

The plaintiff's first claim in his notice of appeal is that "[t]he court erred when it deprived the plaintiff of due process of law, by failing to allow any expert testimony to be presented or to schedule a hearing before said court so that such testimony could be given to ensure the safety of voting machines, after being altered and modified in direct violation of state statute by uncertified personnel." Not. of App. 3. The plaintiff failed to develop this claim in his brief. The plaintiff made only one passing mention of this alleged error in his brief, *see* PB 10, and the plaintiff did not offer any legal argument or authority to support this claim of error. Because the plaintiff did not develop any legal argument on this claimed error, it is not preserved for appellate review.[3] *State v. Blackmer*, 149 N.H. 47, 49 (2003) ("We do not address any additional arguments either because they

[3] Even if this argument were preserved for review, the plaintiff has not carried his burden of demonstrating reversible error. Although the trial court declined to hear formal testimony from the plaintiff's expert, the court admitted the expert's report into the record. SA 143. The plaintiff has not offered any developed legal argument as to how, under these circumstances, he was denied due process of law.

were not preserved, were not sufficiently developed for appellate review, or were not raised in [the defendant's] notice of appeal.").

The plaintiff's second claim in his notice of appeal is that "[t]he court erred when it deprived the plaintiff of due process of law by failing to provide the plaintiff a trial by jury, protected by Part I, art. 14 and Part I, art. 15." Not. of App. 3. As with his first argument, the plaintiff only includes one passing mention of this claim in his brief and does not provide any developed legal argument. *See* PB 6. Therefore, the plaintiff waived this claim. The plaintiff's third claim in his notice of appeal is that "[t]he court erred when it failed to rule on the criminal complaint alledging [sic] violations of RSA 659:9-a, RSA:659:12, RSA 659:13, RSA 659:40 allowing the state not to answer said complaint." Not. of App. 3. Although the plaintiff mentions this claim in his request for relief in his brief, the plaintiff failed to brief this claim and, therefore, waived it. *See* PB 35.[4]

The plaintiff's fifth claim in his notice of appeal is that the "court erred in its opinions as the plaintiff was denied any due process to present any evidence at a hearing to directly challenge of voting statutes (RSA 21:6, 21:6a, RSA chapter 657, RSA 656:40, 656:41, 656:42, that alter or amend the mandatory provisions of Part I, art. 11. Part II, art. 32.)" Not. of App. 3.The plaintiff does not meaningfully develop how he was denied due

[4] Even if this argument were preserved for review, the plaintiff has not carried his burden of demonstrating reversible error. The plaintiff filed a motion to amend with the trial court that withdrew this claim. *See* SA 169-71. Therefore, the trial court could not have erred for by failing to consider this claim.

process for a lack of a hearing or a lack of an ability to present evidence.[5] Therefore, the plaintiff waived this claim.

III. THE PLAINTIFF FAILED TO STATE ANY CLAIM FOR WHICH RELIEF COULD BE GRANTED.

To the extent that this Court construes the notice of appeal to challenge as error generally the trial court's decision to dismiss each of his underlying claims, the defendants address each of those arguments below.

A. The 1976 Amendments to are Neither Contrary Nor Repugnant to the Constitution of New Hampshire

The plaintiff appears to challenge a 1976 amendment to the State Constitution as contrary or repugnant to the Constitution. *See* PB 17-24. The plaintiff's arguments fail as a matter of law.

The New Hampshire Constitution requires constitutional amendments the General Court proposes to be submitted to the voters for their approval. *See* N.H. CONST., Pt. II, Art. 100, § c. This Court has intervened where there is a divergence between "the language that [the voters] have ratified and adopted" and "the effect of the amendments which the Legislature proposed." *Gerber v. King*, 107 N.H. 495, 499 (1967).

Contrary to the plaintiff's arguments, there is no divergence between the language ratified in the 1976 Amendments and the effect of those amendments.

Question 8 as it was presented to voters in 1976 read as follows:

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[5] Even if this argument were preserved for review, the plaintiff has not carried his burden of demonstrating reversible error. The plaintiff did have a hearing on this matter, he did call witnesses, and he did present evidence to the trial court. The plaintiff has not offered any developed argument as to how, under these circumstances, he was denied an opportunity to present evidence at a hearing on this claim. HT 12, 15, 20, 25, 30.

> "Are you in favor of amending the Constitution to make the following changes relating to elections:
>
> a) To reduce the minimum age of voters to eighteen;
>
> b) To make domicile rather than being an inhabitant a prerequisite for the voting privilege;
>
> c) To repeal certain provisions relating to voting in unincorporated places;
>
> d) To specify that the receipt and counting of ballots and notification of winners in biennial election contests will be handled by the Secretary of State; and
>
> e) To provide the right to vote by absentee ballot in biennial or state elections, or in the primary elections therefor, or in city elections or town elections by official ballot?

PB 99.

The language of the State Constitution was changed consistent with the language of these questions. Consistent with question 8(a), the voting age in New Hampshire is 18 years of age, *see* N.H. CONST. Pt. I, Art. 11, and "Senators, How and by Whom Chosen; Right to Suffrage" was repealed as it directly contradicted the new voting age amendment, see N.H. CONST. Pt. II, Art. 28 (repealed). Consistent with question 8(b), domicile is now required to be eligible to vote in New Hampshire, *see* N.H. Const., Pt. I, Art. 11, the original article for "Qualifications of Electors" was repealed as it directly contradicted the new domicile amendment, *see* N.H. Const., Pt. II, Art. 13, and the word "domiciled" was added to the Constitution's definition of "inhabitant," *see* N.H. Const., Pt. II, Art. 30.

Consistent with question 8(c), State Constitution Part II, Article 31, titled "Inhabitants of Unincorporated Places; Their Rights, etc." was repealed and Part I, Article 11 was updated to reflect unincorporated places. *See* N.H. Const., Pt. I, Art. 11; Pt II, Art. 31 (repealed). Consistent with question 8(d), State Constitution Part II, Article 33, titled "Secretary of State to Count Votes for Senators and Notify Persons Elected," was amended to reflect the new responsibilities of the Secretary of State. *See* N.H. Const., Pt. II, Art. 33. Consistent with question 8(e), Part I, Article 11 of the State Constitution was amended to require the General Court to provide by law for absentee voting. *See* N.H. Const., Pt. I, Art. 11.

All these changes are reflective of the will of the voters and flow sensibly from the questions that were presented to the voters.

B. Ballot Counting Devices are not Being Used Unconstitutionally in New Hampshire.

The plaintiff appears to argue that the use of ballot counting devices in Auburn was somehow unconstitutional. To the contrary, the State Constitution does not prohibit the use of ballot counting devices, and the Legislature properly enacted laws authorizing the Ballot Law Commission to approve ballot counting devices for use in elections, and authorizing municipalities to choose to use ballot counting devices. *See* RSA 656:40-:41.

The Legislature has constitutional authority to enact laws such as RSA 656:40. *See* N.H. CONST., Pt. II, Art. 5 (granting the Legislature the authority to enact "all manner of" laws that are "not repugnant or contrary to this constitution"). No part of the State Constitution mandates hand counting of election results or prohibits the use of ballot counting devices in

elections. Therefore, the Legislature's enactment of laws authorizing municipalities to use ballot counting devices is a proper exercise of the Legislature's constitutional authority to enact laws.[6]

Similarly, the Legislature's creation of the Ballot Law Commission and delegation of authority to the Ballot Law Commission to enact certain rules is proper. "It is well settled in this State that the Legislature may delegate to administrative agencies the power to promulgate rules necessary for the proper execution of the laws." *Opinion of the Justices*, 121 N.H. 552, 557 (1981). The Legislature's delegation of rulemaking authority is proper if the Legislature "declare[s] a general policy and prescribes standards for administrative action." *Id*.

Here, the Legislature organized the Ballot Law Commission in RSA chapter 665. Consistent with the Legislature's long-recognized power to delegate rule-making authority, the Legislature authorized the Ballot Law Commission to "make such rules as may be necessary to ensure the accuracy of electronic ballot counting devices, including rules for the testing of electronic ballot counting devices prior to each election and the submission of testing records to the secretary of state." RSA 656:42; *see also* RSA 656:41 (providing that the Ballot Law Commission "shall, whenever requested, examine any device which may be capable of meeting the requirements for elections held in this state and shall, at least every 5 years, review current and new devices to determine whether the devices require upgrading"). The Legislature prescribed standards for administrative action (enactment of rules to ensure authorized ballot

[6] The defendants note that any candidate may seek a recount and all recounts in New Hampshire are conducted by hand. *See* RSA 660:1; 660:5; 669:30; 669:32; 670:11; 671:32.

counting devices are accurate and tested prior to each election) that are related to the Legislature's general policy of authorizing municipalities to use ballot counting devices in elections. *See* RSA 656:40 to :42. Therefore, the Legislature's delegation of rulemaking authority to the Ballot Law Commission related to ballot counting devices is proper.[7]

C. The Absentee Voting Provisions the Plaintiff Challenges are Constitutional.

The plaintiff contends that various absentee voting provisions contained in RSA chapter 657 are unconstitutional, including: the religious observation provision, RSA 657:1, I; RSA 657:4, I; RSA 657:7, I-II; the employment obligation provision, which includes the care of children and infirm adults, RSA 657:1, I; RSA 657:4, I; RSA 657:7, I-II; the National Weather Service winter storm, blizzard, or ice storm warning, RSA 657:1, II; RSA 657:4, I; RSA 657:7, I-II; and the confined in a penal institution for a misdemeanor or while awaiting trial provision, RSA 657:4, I; RSA 657:7, II. These claims are framed generally and can only be construed as facial challenges to these various statutory provisions. "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." *State v. Lilley*, 171 N.H. 766, 772 (2019). These statutory provisions are also "presume[d] . . . to be constitutional and will not [be]

[7] The defendants note that, for the first time, the plaintiff makes the argument that "the use of voting machines is being used to conceal, and count uncertified absentee ballots by inserting uncertified, and unqualified absentee ballots into voting machines." PB 26. This argument was not raised before the trial court, and therefore is not appropriately before this Court. *See generally* SA 31-95; PA 51-9.

declare[d] invalid except upon inescapable grounds." *State v. Hollenbeck*, 164 N.H. 154, 157 (2012).

Thus, to show that these statutory provisions are unconstitutional, the plaintiff must demonstrate that these statutory provisions clearly conflict with the State Constitution in every, or virtually every, set of circumstances. *See Lilley*, 171 N.H. at 772 ("To prevail on a facial challenge, the challenger must establish that no set of circumstances exists under which the challenged statute or ordinance would be valid."); *Hollenbeck*, 164 N.H. at 157 ("[W]e will not hold a statute to be unconstitutional unless a clear and substantial conflict exists between it and the constitution."). The plaintiff has not met and cannot meet this heavy burden. His claims therefore fail as a matter of law.

In *Opinion of the Justices*, 44 N.H. 633 (1863), the House of Representatives requested this Court provide it with an opinion on the constitutionality of certain military absentee voting legislation. The legislation would have enabled every qualified voter of the State engaged in military or naval service for the State or the United States, whose name was on the check-list in the town in which he had his home and who was located outside the limits of the State as a result, to be present by his attorney and vote by ballot at elections. *Id.* at 633. In construing the State Constitution, the justices of this Court opined that the bill was unconstitutional. The Court explained:

> By the common law, in elections of public and municipal corporations, and in all other public elections, every vote must be personally given. 2 Kent Com. 294* (citing the case of the *Dean*, &c., *of Fernes*, Davies 129); Ang. & A. Corp. (3d ed.) 95-97; *Taylor* v. *Griswold*, 2 Green (N. J.) 226, 234,

> 235; *Phillips* v. *Wickham*, 1 Paige Ch. 578; *State* v. *Tudor*, 5 Day 329; see *Atty. Genl.* v. *Scott*, 1 Ves. 413. The history of the origin of the powers of towns in New-England, and of the nature and usages of their meetings, shows that in this respect the practice here, before and at the date of the adoption of the Constitution, was in accordance with the general rule of the common law. As the language of the Constitution is to be understood in the sense in which it was used at the time of its adoption, (Opinion of the Justices, 41 N.H. 550, 551), and as at that time, both by the common law and by the settled usage here, the right of voting for public officers was a right that must be exercised personally by the voter at the meeting held for the purpose, it follows that, if no different provision is made in the Constitution, the right of suffrage established by it is to be exercised by the voter in person, at the meetings duly held for the purpose.

Id. at 634-35. This Court went on to review Part II, Articles 12, 27, 28, 30, 31, 32, 42, 60, 71, and 99 of the State Constitution and explained:

> These provisions of our Constitution, so far from showing an intention to depart from the general rule of the common law as to the personal presence of voters at public elections, seem to us to assume its applicability, and to require that the right of voting shall be exercised by the voter in person at the meetings duly held for the purpose in the places of the State pointed out by the Constitution, and at times in accordance with its provisions.

Id. at 635-36. This Court therefore opined that "this bill, in its most prominent feature, is in conflict with the provisions and spirit of our Constitution." *Id.* at 637.

Approximately fifty years later, in *Opinion of the Justices*, 80 N.H. 595 (1921), this Court reaffirmed the 1863 Opinion of the Justices when it opined that a bill "To Permit Absent Voters and Voters who by reason of

Physical Disability are Unable to Vote in Person to Vote at Biennial Elections" was unconstitutional absent constitutional authorization. The first section of the bill resembles language presently contained in Part I, Article 11 and stated, "Any voter who on the day of the biennial election is absent from the city, town, or district, in which he is qualified to vote, or who by reason of physical disability is unable to vote in person, may vote in accordance with the provisions hereinafter set forth." *Id.* at 596. The remaining provisions set forth a robust absentee voting framework. *Id.*

In reviewing the bill, this Court observed that it appeared to be modeled on a recently passed Massachusetts statute, but that Massachusetts had recently adopted a state constitutional providing that, "The General Court shall have power to provide by law for voting by qualified voters who, at the time of the election, are absent from the city or town of which they are inhabitants in the choice of any officer to be elected or upon any question submitted at such election." *Id.* at 602-03 (quoting Art. XLV, Amendment, Const. Mass.).

This Court therefore framed the inquiry before it as follows: "[W]hether in the absence of power expressly given by constitutional amendment the Legislature has power to provide as proposed." *Id.* at 603. It then concluded, "That such power does not exist was settled nearly fifty years ago not only in this state but in others with similar constitutional provisions as to all offices created by the several state constitutions." *Id.*; *see id.* at 606 ("That at common law in all elections of a public nature every vote must be personally given is a proposition upon which the authorities are uniform."). This Court cited to the 1863 Opinion of the Justices and other out of state authority to support its opinion and remarked that other

states had solved the military absentee voting issue by constitutional amendment. *Id.* Ultimately, this Court concluded its opinion as follows: "To restate our conclusions: the manner of voting prescribed by the bill is contrary to the state constitution, and its provisions would be invalid as to the election of all state officers; they would be valid as to the election of presidential electors; we are unable to say the provisions would be held valid as to the election of senators and representative in congress." *Id.* at 607.

In 1942, Part I, Article 11 was successfully amended to include authorization for absentee voting under circumstances identical to those in the proposed 1921 legislation in general elections. In 1956, Part I, Article 11 was successfully amended to extend this absentee voting authorization to primary elections. In 1976, Part I, Article 11 was successfully amended to require the legislature to provide for absentee voting for certain qualified voters. In 1984, Part I, Article 11 was further amended to assure that all polling places are accessible. That amendment language reads, in relevant part: "Voting registration and polling places shall be easily accessible to all persons including disabled and elderly persons who are otherwise qualified to vote in the choice of any officer or officers to be elected or upon any question submitted at such election." N.H. Const. Pt. I, Art. 11.

The absentee voting provisions the plaintiff challenges do nothing more than implement the directive of Part I, Article 11 related to absentee voting and polling place accessibility. The National Weather Service winter storm, blizzard, or ice storm warning provisions help ensure that the polling place remains accessible to qualified voters who may not be able to vote due to certain extreme weather conditions. The religious commitment

observation provision helps ensure that the polling place remains accessible to qualified voters who may not be able to vote due to their religious commitments, and if the religious commitment requires them to be absent from the city or town in which they are domiciled, ensures their ability to vote absentee. Religious liberty is protected by other provisions of the New Hampshire Constitution, and the religious commitment provision reflects a permissible legislative judgment that persons should not have to choose between exercising their fundamental right to vote and their fundamental right to worship.

The employment obligation provision similarly recognizes that persons may find themselves in employment situations, including situations involving the care of others, that either cause them to be absent from the city or town in which they are domiciled, or make the polling place inaccessible to them, on election day. This statutory provision reflects a permissible legislative judgment with respect to both those concerns. Finally, the provision for those confined in a penal institution for a misdemeanor or while awaiting trial in many instances likely concerns persons who are absent from the city or town in which they are domiciled, but in the instances where such a person is confined in the city or town in which they are domiciled, the Legislature may properly choose to make the polling place accessible to them through an absentee ballot because those persons possess the right to vote and find themselves in a scenario where the polling place is inaccessible to them.

Accordingly, the defendant has failed to establish that the statutory absentee ballot provisions are not permissible exercises of legislative authority under Part I, Article 11, nor has he established the facial invalidity

those statutory provisions that in many instances would result in a person being absent from the city or town in which they are domiciled. His constitutional claims with respect to these absentee voting provisions therefore fail.

D. The Legislature did not Unconstitutionally Alter the Definition of "Qualified Voter."

The plaintiff additionally appears to argue that the Legislature unconstitutionally altered the definition of qualified voter. PB 33-4. The plaintiff appears to argue that a "qualified voter" is an "inhabitant," and that RSA 21:6 is therefore unconstitutional because it "comingles the word 'resident' with the word 'inhabitant'" and therefore "grants the right to vote to 'resident' aliens (non-citizens of the State of N.H.)." *Id*.

The plaintiff did not allege in his complaint that Auburn allowed any person who is not a United States Citizen and New Hampshire domiciliary to vote in an election. This claim is therefore not preserved and should be deemed waived.

Even if this claim has not been waived, however, it fails as a matter of law. The State Constitution defines the word "inhabitant": "every person, qualified as the constitution provides, shall be considered an inhabitant for the purpose of being elected into any office or place within this state, in the town, or ward, where he is domiciled." N.H. CONST., Pt. II, Art. 30. Consistent with this constitutional definition, RSA 654:1 provides that "Every inhabitant of the state, having a single established domicile for voting purposes, being a citizen of the United States, of the age provided for in Article 11 of Part First of the Constitution of New

Hampshire, shall have a right at any meeting or election, to vote in the town, ward, or unincorporated place in which he or she is domiciled." RSA 654:1 (emphases added); *see also Casey v. N.H. Secy. State*, 173 N.H. 266, 272 (2020) (concluding that a "person with a New Hampshire 'domicile' under RSA 654:1 is necessarily a 'resident' under RSA 21:6"). Thus, RSA 654:1 defines a qualified voter as a citizen of the United States who is domiciled in New Hampshire.

RSA 21:6 merely provides the statutory construction that the terms "resident" and "inhabitant" should be given in statutes. However, RSA 21:6 does not purport to establish the qualifications of a voter, and the statute that does establish voter qualifications. RSA 654:1 requires voters to be both United States citizens and New Hampshire domiciliaries.

E. Additional Arguments that were not Preserved for Appellate Review:

> The plaintiff argues for the first time in his brief that:
>
> [t]he measures taken unconstitutional allowance by the Defendants to count uncertified and unqualified absentee ballots (affidavits not properly executed) which are then inserted into a voting machine to be counted as legal ballots is ballot box stuffing, and a violation of N.H. RSA 666:2, Official Malfeasance, RSA 666:3 Official Misconduct, RSA 638:12 Fraudulent Execution of Documents, RSA 643:1 Official Oppression, and Federal law, **52 U.S. Code § 20511 (1)(A), (2)(A)(B).**

PB 30 (emphasis in original). The plaintiff failed to raise this argument before the trial court. *See generally* SA 31-95; PA 51-9. Therefore, this argument is not preserved for appellate review.

Similarly, the plaintiff argues for the first time in his brief "that the Defendants have worked together to applied [sic] different standards,

practices, or procedures to affidavit certification requirements." *Id*. at 32. The plaintiff failed to raise this argument before the trial court. *See generally* SA 31-95; PA 51-9. Therefore, this argument is not preserved for appellate review.

F. The Plaintiff was Afforded the Right to Vote.

The plaintiff's various claims appear to be based on his underlying mistaken belief that he was somehow denied the right to vote. PB 8-9; 24-5.

The plaintiff alleged in his complaint that on March 9, 2022, he "checked in to vote with supervisor of the checklist and was given a ballot." SA 58. When the plaintiff "asked [the supervisor of the checklist] where the hand counting deposit box was," he was "informed that voting machines would be used to count the votes." *Id*. The plaintiff did not allege that any election official refused to allow him to place his ballot into the ballot counting devices the town was using for that election nor does he allege that he was prevented in any way from casting a ballot. Thus, the plaintiff was afforded the right to vote in the March 9, 2022, election because he received a ballot and was given the same opportunity to place his ballot into a ballot counting device as other voters who participated in that election.

The plaintiff has not identified any legal authority that suggests he has some right to refuse to comply with generally applicable election procedures, let alone a right to refuse to place his ballot in an authorized ballot counting device. There is not, nor has there ever been, a constitutional right to have one's vote hand counted in New Hampshire.

Outside of statutorily prescribed circumstances such as recounts, there is no constitutional provision, statute, or jurisprudence that would support such a right.

CONCLUSION

The plaintiff's brief consists of a "laundry list" of complaints and disagreements with New Hampshire law, the trial court's ruling, and this Court's jurisprudence. Many of these arguments are not preserved for review because the plaintiff did not raise the argument before the trial court or raised the argument in his notice of appeal but did not properly brief them. For the arguments that the plaintiff did properly preserve for appellate review and brief, these arguments fail to state a claim for which relief may be granted.

The defendants do not request oral argument. In the event that the Court calls this case for oral argument, Matthew Conley will present on behalf of the defendants.

Respectfully submitted,

THE STATE OF NEW HAMPSHIRE
AND THE SECRETARY OF STATE

By their attorneys,

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Date: August 18, 2023

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CERTIFICATE OF COMPLAINCE

I hereby certify that pursuant to Rule 16(4)(b) of the New Hampshire Supreme Court Rules, this brief contains approximately 7,135 words, which is fewer than the words permitted by this Court's rules. Counsel relied upon the word count of the computer program used to prepare this brief.

August 18, 2023

/s/ Matthew G. Conley
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the State's brief was served on all parties through the court's electronic filing system.

August 18, 2023 */s/ Matthew G. Conley*
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