

New Hampshire Supreme Court

Case Number 2023-0097

Daniel Richard

v.

State of New Hampshire and Town of Auburn, et al

TOWN OF AUBURN’S SUPPLEMENTAL BRIEF

The plaintiff does not have standing to bring any of his six claims against the Town of Auburn because: 1) he has not suffered an injury distinguishable from a generalized wrong; 2) his rights are not adverse to the Town's; and 3) the disputes he raises are not capable of judicial redress vis-à-vis the town.

Introduction

On April 5, 2024, this Court directed the parties to file supplemental briefing to address whether “the plaintiff has standing as to each of the specific counts set forth in his complaint.”

“In a typical case, determining whether a party has standing to sue requires that [the Court] focus on whether the party has alleged a legal injury against which the law was designed to protect.” *Carrigan v. N.H. Dep’t of Health & Hum. Servs.*, 174 N.H. 362, 367 (2021). “[S]tanding under the New Hampshire Constitution requires parties to have personal legal or equitable rights that are adverse to one another . . .” *Duncan v. State*, 166 N.H. 630, 642-43 (2014). “A party must allege a concrete, personal injury, implicating legal or equitable rights, with regard to an actual, not hypothetical, dispute, which is capable of judicial redress by a

favorable decision.” *Carrigan*, 174 N.H., at 367. “To establish standing, the plaintiff must show that it is likely, as opposed to merely speculative, that his injury will be redressed by a favorable decision.” *Teeboom v. City of Nashua*, 172 N.H. 301, 309 (2019) (emphasis, quotations, and brackets omitted).

Whether a party has suffered a legal harm can be determined by examining the remedies that party seeks. *See Libertarian Party of N.H. v. Sec’y of State*, 158 N.H. 194, 196 (2008) (“[T]he NHRSC’s lack of a legal harm is thrown into sharp relief by a review of the remedy it seeks.”). “Neither an abstract interest in ensuring that the State Constitution is observed nor an injury indistinguishable from a generalized wrong allegedly suffered by the public at large is sufficient to constitute a personal, concrete interest.” *Conduent State & Loc. Sols., Inc. v. N.H. Dep’t of Transportation*, 171 N.H. 414, 418 (2018). “Rather, the party must show that its own rights have been or will be directly affected.” *Id.*

Thus, to determine whether the plaintiff has standing, the Court must look to the harm that Plaintiff alleges and the relief that he seeks.

Factual allegations

As the Court observed, Plaintiff’s operative complaint raises six counts:

- 1) the plaintiff was “deprived of his right to vote in the Town of Auburn” when he was not permitted to vote by hand instead of using an electronic voting machine;
- 2) the statutes contained in RSA 656:40 et seq are unconstitutional because they allow the use of electronic voting machines;

- 3) RSA 656:40-:42 (2016 & Supp.2023) are unconstitutional because they permit the use of electronic vote counting devices which lack testing or certification procedures;
- 4) RSA 21:6 (2020), RSA 21:6-a (2020), and RSA 654:1 (2016) are unconstitutional because they changed the definition of who can vote in New Hampshire;
- 5) RSA chapter 657 is unconstitutional because it improperly expands access to absentee voting; and
- 6) the 1976 amendments to the State Constitution resulting from the outcome of a statewide ballot question related to elections are invalid because the amendment process was contrary to the constitution.

April 5, 2024, Order, at 1.

Plaintiff asserts that, as a result of the State's and the Town's conduct in relation to those counts, he suffered the following harm:

- 1) "The Plaintiff believes that he has been disfranchised, and his vote diluted[,]" Compl., Plaintiff's Apx., at 18, ¶ 59; *id.* at 36, ¶ 129;¹
- 2) "The Plaintiff is now deprived of the following constitutional rights and continues to suffer irreparable psychological and emotional pain, resulting in physical pain[,]" *id.*, at 43, ¶ 154;
- 3) "The Plaintiff is further injured by the cost, and the time and labor necessary to fight the unconstitutional encroachments upon his rights[,]" *id.*;
- 4) "Depr[i]vation of substantive and procedural due process of law[,]" *id.*;
- 5) "Abolishing all effective means of redress of grievances[,]" *id.*;
- 6) "Alterations to the voter qualifications required by the Constitution without the consent of the inhabitants[,]" *id.*;
- 7) "[C]hanges to our statutory voting laws[,]" *id.*;

¹ Citations to the complaint contain reference to page numbers of Plaintiff's Appendix rather than the page numbers of the complaint.

- 8) “[C]hanges to our laws[,]” *id.*;
- 9) “[C]hanges to our form of government[,]” *id.*;
- 10) “[C]hanges to our representation at the State and Federal level[,]” *id.*; and
- 11) “[C]hanges to our taxes[,]” *id.*

As redress for those injuries, Plaintiff seeks:

- 1) “[R]elief from the physical, p[sych]ological trauma, and public embarrassment experienced from the Defendants[’] continued violation described here with regard to their intentional failures to provide relief to allow his vote to count[,]” *id.*, at 46-47, ¶ 1;
- 2) “[I]njunctive relief restraining the Defendants from exclusively using electronic means of vote counting in place of the requirements of Part II, art. 32[,]” *id.*, at 47, ¶ 3;
- 3) “[I]njunctive relief restraining the Defendants from ignoring the hand counting required by N.H. Constitution, should electronic vote counting continue[,]” *id.*, at 47, ¶ 4;
- 4) “[E]njoin the Defendants from using electronic open-source voting machines[,]” *id.*, at 47, ¶ 5;
- 5) “[I]njunctive relief restraining the Defendants from entering any contractual agreements used for voting without legislative approval of the body of the whole[,]” *id.*, at 47, ¶ 6.

For each count, Plaintiff seeks additional relief. For Count I, “Plaintiff seeks injunctive or declaratory relief enjoining the Town Defendants from prohibiting the Plaintiff[’]s right to vote in accordance with the teaching of the Constitution of N.H. – requiring my vote to be hand counted.”² *Id.*, at 47, ¶ 7. For Count II and Count III, “Plaintiff seeks a

² As the Superior Court noted in its November 10, 2022, Order, the Town permitted Plaintiff to have his vote hand counted at the September 30, 2022, primary election. *See* Order on Defendants’ Motion to Dismiss, at 14.

declaratory judgement striking down N.H. RSA 656:40, N.H. RSA 656:41, [and] RSA 656:42[.]” *Id.*, at 47-48, ¶¶ 8-9. For Count III, Plaintiff also “seeks declaratory and injunctive relief, prohibiting the use of Dominion/Di bold voting machines as currently used and described.” *Id.*, at 47-48, ¶ 9. For Counts IV and V, Plaintiff seeks various declaratory judgments related to New Hampshire State Statutes. *Id.*, at 48, ¶¶ 10-12. For Count VI, he seeks “declaratory judgement striking down the effects of the 1976 amendments [to the New Hampshire Constitution] resulting from the outcome of Question 8 of the 1976 Voters Guide[.]” *Id.*, at 48-49, ¶ 13.

Argument

Plaintiff’s lack of standing as to any of the six counts in his complaint is clear based upon the injuries he claims and the remedies he seeks. Plaintiff’s requested remedies, on the whole, seek to prevent the use of electronic voting machines in New Hampshire and change who is allowed to vote in this state. Those remedies demonstrate that the harm Plaintiff seeks to cure is not his personal, concrete injury but, instead, precisely the type of “generalized wrong allegedly suffered by the public at large” this Court has warned is insufficient. *Conduent State & Loc. Sols., Inc.*, 171 N.H., at 418. That, alone, is sufficient for this Court to conclude that Plaintiff does not have standing to bring any of his claims. As an independent basis for reaching that conclusion with respect to Plaintiff’s claims against the Town, a favorable decision for Plaintiff against the Town on any one of the six counts will not redress his injuries. And, with respect to Counts II-VI, Plaintiff’s claimed interest is simply not adverse to the Town’s because the Town has no interest at stake with respect to those counts.

A. Plaintiff's alleged injuries are generalized wrongs insufficient to constitute a personal, concrete interest.

Overall, Plaintiff's injuries are "generalized wrong[s] allegedly suffered by the public at large" - as is evident by reference to the remedies he seeks. *Conduent State & Loc. Sols., Inc.*, 171 N.H., at 418. As relief, Plaintiff broadly seeks to eliminate the use of electronic voting machines, change who is allowed to vote through injunctive or declaratory relief, to have the Court declare unconstitutional a number of State statutes related to electronic voting machines and voters, and to undo the 1976 amendments to the New Hampshire Constitution. Plaintiff's Apx., at 46-49, ¶¶ 1-13. That this is the relief Plaintiff seeks plainly shows that his aim is not to vindicate a personal right, but, instead, to revamp the state-wide election process.

Even Plaintiff's allegations about his injuries point squarely at an "abstract interest in ensuring the State Constitution is observed[.]" *Conduent State & Loc. Sols., Inc.*, 171 N.H., at 418. He claims, as injuries, changes to the law broadly, Plaintiff's Apx., at 43, ¶ 154; "irreparable psychological and emotional pain, resulting in physical pain" related to alleged constitutional violations, *id.*; the cost, time, and labor of bringing suit related to those alleged violations, *id.*; and his "belie[f]" that he has been disenfranchised as a result of the alleged violations, *id.*, at 18, ¶ 59. However strongly Plaintiff may feel about the issues raised in his complaint, these allegations are, fundamentally, about the plaintiff's interest in ensuring the Constitution is observed rather than allegations showing that Plaintiff's personal interests have been "directly affected." *Conduent State & Loc. Sols., Inc.*, 171 N.H., at 418.

Plaintiff's allegations do not show the type of concrete injury this Court requires to show standing. For example, in *Teeboom*, this Court held that a taxpayer had a direct, concrete injury sufficient to confer standing where the taxpayer alleged that his property taxes rose by approximately \$300 in one year as a result of a city budget that unlawfully excluded a wastewater treatment fund from the spending cap calculation. 172 N.H., at 307-09. The Court explained that the plaintiff's "allegedly increased property taxes are not an abstract possibility. The 2018 budget was adopted, and, as the City concedes, it was based upon calculations that excluded the wastewater treatment fund from the spending cap." *Id.* at 308. Even though other taxpayers would suffer the same injury, it was not a generalized wrong because the plaintiff "contested the collection of a specific tax, arguing that it results from a budget that is based upon an unlawful spending cap calculation." *Id.* at 307. Here, with one exception discussed *infra*, note 3, Plaintiff has not identified any *personal* interest that was directly affected. He has identified no specific laws, taxes, changes to the form of government, or changes to his State or Federal representation that have impacted him directly.

As several courts have recognized, "plaintiffs who allege nothing more than having had their votes diluted lack standing to sue" because the harm is a general harm shared by all and not particular to the plaintiff's own rights. *See, e.g., True the Vote v. Hoseman*, 29 F. Supp. 3d 870, 872 (N.D. Miss. 2014); *Feehan v. Wisconsin Elections Comm'n*, 506 F. Supp. 3d 596, 608 (E.D. Wis. 2020); *Paher v. Cegavske*, 457 F. Supp. 3d 919, 926 (D. Nev. 2020); *Donald Trump for President, Inc. v. Cegavske*, 488 F. Supp. 3d 993, 999–1000, (D. Nev. 2020); *Martel v. Condos*, 487 F. Supp.

3d 247, 252–53, (D. Vt. 2020) (“If every voter suffers the same incremental dilution of the franchise caused by some third-party’s fraudulent vote, then these voters have experienced a generalized injury.”); *Paher v. Cegavske*, 457 F. Supp. 3d 919, 926-27 (D. Nev. 2020); *Am. Civil Rights Union v. Martinez-Rivera*, 166 F. Supp. 3d 779, 789 (W.D. Tex. 2015) (“[T]he risk of vote dilution [is] speculative and, as such, [is] more akin to a generalized grievance about the government than an injury in fact.”); *see also Testerman v. NH Sec’y of State*, No. 23-CV-499-JL-AJ, 2024 WL 1482751, at *4-5 (D.N.H. Jan. 9, 2024) (“Thus, it is not enough for the plaintiffs to allege that their votes were ‘diluted’ as a result of other voters casting allegedly invalid votes. . . . In other words, standing to sue requires the plaintiffs to show that they are disadvantaged in a different way than every other voter.”). Without an allegation of direct and particularized harm to the plaintiff, there can be no standing.

B. Even if Plaintiff had alleged a legal injury, he lacks standing to bring any of his six counts against the Town.

Plaintiff also lacks standing for each of his six counts because his interests are not adverse to the Town and because a decision in his favor against the Town would not provide redress for his claimed injuries.

The plaintiff lacks standing to pursue Count I, alleging that he was “deprived of his right to vote in the town of Auburn” when he was required to vote using an electronic voting machine in March of 2022,³ because, if

³ This is the sole count where Plaintiff identifies a *personal* interest that was directly affected. However, being required to use an electronic voting machine is not a deprivation of the right to vote. *See Kibbe v. Town of Milton*, 142 N.H. 288 (1997) (“[W]e have long recognized that the legislature is entitled to regulate the time, place, and *manner* of elections in

there were a decision in his favor on this count, it would not provide Plaintiff redress. As a remedy for this alleged injury, Plaintiff seeks injunctive or declaratory relief “requiring *my* vote to be hand counted.” Plaintiff’s Apx., at 45, ¶ 7 (emphasis added). As the Superior Court noted, in a factual finding that Plaintiff does not challenge, the Town permitted Plaintiff to have his vote hand counted at the September 30, 2022, primary election. Order on Defendants’ Motion to Dismiss, November 10, 2022, at 14. There is no dispute between Plaintiff and the Town as Plaintiff has requested that his vote be hand counted, and the Town has agreed to count his vote by hand.⁴ Whether the Town was obligated to count all votes by hand or whether the Town was obligated to pay damages for a past constitutional wrong are not issues raised by Plaintiff’s Complaint. *See* Plaintiff’s Appendix at pages 46-49, ¶¶ 1-13.

Counts II - VI pertain to various New Hampshire statutes and a 1976 constitutional amendment. The Town has no interest adverse to Plaintiff’s with respect to these state laws. The Town’s only interest, as it pertains to these laws, is in ensuring that the Town follows the law. And a favorable decision on Counts II-VI for Plaintiff would not provide redress from the Town. Redress would come from the State. *See Kibbe*, 142 N.H., at CITE (“At the same time, we have long recognized that the *legislature* is entitled

New Hampshire, and we enforce such regulations when they are reasonable.” (emphasis added)(citations omitted)). Plaintiff was welcome to cast his ballot in the same manner as all other voters.

⁴ In Plaintiff’s supplemental brief, filed April 24, 2024, he asserts without citation that “[t]he NH legislature recently established a hand count prohibition in all towns that use electronic voting machines . . .” Plaintiff’s Supp. Brief, at 9. The Town is unaware of any such prohibition.

to regulate the time, place, and manner of elections in New Hampshire . . .” (emphasis added)); *see also* U.S. CONST. art. I, § 4 (“The Times, Places and Manner of holding Elections for Senators and Representatives, *shall be prescribed in each State by the Legislature thereof*; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.” (emphasis added)).

C. Though Plaintiff lacks standing, the laws he seeks to challenge are not beyond the scope of judicial review.

Plaintiff, lacking any direct, personal interest sufficient to confer standing, cannot mount the challenges raised in his complaint. But those challenges may yet be presented to this Court by others. A decision that this particular plaintiff does not have standing does not preclude another individual – someone whose personal interest is directly affected by the laws identified in the complaint, like the plaintiff in *Teeboom* – from challenging those laws.

Moreover, the constitutional basis for the standing doctrine provides an alternative means for these laws to be reviewed by the Court. “The doctrine of standing limits the judicial role, consistent with a system of separated powers, to addressing those matters that are traditionally thought to be capable of resolution through the judicial process.” *Carrigan*, 174 N.H., at 366 (quotations omitted). “In New Hampshire, standing in the traditional sense is grounded in Part II, Article 74 of the State Constitution, which provides: ‘Each branch of the legislature as well as the governor and council shall have authority to require the opinions of the justices of the supreme court upon important questions of law and upon solemn occasions.’” *Id.*, (quoting N.H. CONST. pt. II, art. 74). That constitutional

provision identifies three parties that could present for this Court's review the issues Plaintiff seeks to raise here, even if no individual establishes standing: the House, the Senate, and the Governor and Council.

Conclusion

Plaintiff does not have standing to bring any of the six claims identified in his complaint because he has not alleged a personal interest that has been directly affected. Even if he had alleged such an interest, his interests are not adverse to the Town's, and a decision in his favor would provide him no relief from the Town. Therefore, the Court should hold that Plaintiff has no standing to bring Counts I-VI against the Town.

Respectfully submitted,

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By its attorneys,

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Certificate of Service

I hereby certify that on this 25th day of April, 2024, a copy of the Town of Auburn's Supplemental Brief has been served via the Supreme Court's e filing system on Daniel Richard and all counsel of record.

/s/ Michael J. Tierney
Michael J. Tierney, Esq.

Certificate of Compliance

I hereby certify that this Supplemental Brief contains 2,911 words and complies with the word limitation set by the Court in its April 5, 2024, Order.

/s/ Michael J. Tierney
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