THE STATE OF NEW HAMPSHIRE

ROCKINGHAM, SS. SUPERIOR COURT

218-2022-CV-00676

Daniel Richard

v.

Daniel A. Goonan, et al.

DEFENDANTS' MOTION TO DISMISS

NOW COME the named defendants, by and through counsel, the Office of the Attorney General, and move to dismiss the complaint in this matter on the grounds of standing and plaintiff's failure to state a claim for which relief may be granted. In support thereof, the defendants state as follows:

Procedural History

1. On August 22, 2022, the plaintiff filed the present complaint in Rockingham Superior Court with the plaintiff appearing on his own behalf. The New Hampshire Attorney General accepted service on behalf of all defendants on September 2.

2. On August 31, the plaintiff filed an *ex parte* motion for an emergency injunction that this Court denied. This matter was then scheduled for a preliminary hearing in this Court on September 9.

3. On September 7, the plaintiff filed an emergency motion to allow for expert testimony, specifically for the testimony of a Wayne P. Saya. Mr. Saya's report was disclosed to the defendants on that same date. On September 8, the defendants objected to expert testimony at the hearing for the preliminary injunction.

4. The previously scheduled hearing went forward on September 9 with this Court granting the plaintiff's motion relating to expert testimony in part and denying it in part. Specifically, the Court accepted Mr. Saya's report into the record but did not allow his testimony during the hearing itself. The plaintiff argued his motion before this Court, as well as calling and examining several lay witnesses.

5. On September 9, the plaintiff filed a motion to reconsider the Court's denial of expert testimony regarding the preliminary injunction. On September 12, this Court issued a written order denying the plaintiff's motion for a preliminary injunction. On September 27, this Court denied the plaintiff's motion to reconsider.

6. The defendants now move to dismiss the complaint in its entirety on the grounds of standing and the failure to state a claim upon which relief may be granted.

The Plaintiff Has Not Stated a Claim for Which Relief May be Granted

7. The plaintiff has not asserted a claim for which relief may be granted. For the purposes of efficiency and avoiding repetition, the arguments related to standing are subsequent to this section, and incorporate the analysis and argument included in this section.

8. The plaintiff words his claims differently in different parts of his pleading and there is some overlap in the arguments that he presents. The defendants therefore clarify their understanding of the plaintiff's complaints, while making no admissions, as follows:

a. Count 1: The plaintiff was denied his right to vote when he was not permitted to vote by hand.
b. Count 2: RSA 656:40, RSA 656:41, and RSA 656:42 are unconstitutional because they allow the use of electronic voting machines.

c. Count 3: RSA 656:40, RSA 656:41, and RSA 656:42 are unconstitutional because there are no testing or certification procedures for voting machines.

d. Count 4: RSA 21:6, RSA 21:6-a, and RSA 654:1 are unconstitutional because they improperly change the definition of who can vote in the State of New Hampshire.

e. Count 5: RSA 657 is unconstitutional because it inappropriately expands access to absentee voting.

f. Count 6. The 1976 Amendments resulting from the outcome of Question 8—a statewide ballot question to make constitutional changes related to elections[1]—are repugnant and contrary to the Constitution of New Hampshire.

9. "In general, a motion seeking judgment based solely on the pleadings is in the nature of a motion to dismiss for failure to state a claim upon which relief may be granted." *Sivalingam v. Newton*, 174 N.H. 489, 493-94 (2021) (citing *LaChance v. U.S. Smokeless Tobacco Co.*, 156 N.H. 88, 93, (2007)). "In reviewing a motion to dismiss for failure to state a claim, we assume the truth of the facts alleged by the plaintiff and construe all reasonable inferences in the light most favorable to the plaintiff." *Id*. "We 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, we may consider documents attached to the plaintiff's pleadings, documents the authenticity of which are not

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[1] The text of Question 8 read as follows:
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 relative 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?

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 alleged facts do not constitute a basis for legal relief, we will reverse the denial of the motion for judgment on the pleadings." *Id*. (citing *LaChance*, 156 N.H. at 93).

10. Taking all of the facts of this case as truth and construing them in the light most favorable to the plaintiff, the plaintiff's complaint should be dismissed.

Count I

11. In Count I, the plaintiff claims that he was denied his right to vote when he was not permitted to vote by casting a ballot to be counted by hand, and was instead instructed by the Town of Auburn moderator to cast his ballot to be counted by a ballot counting device. Cpl. paras 27-41. The plaintiff states that the moderator's "refusal to count the vote as required by the Constitution, Part II, art. 32. [sic] is a denial of my right to vote, by attempted coercion, as the only option made available to me was the use of unconstitutional programable, open source, electronic voting machines." Cpl. para 37.

12. It does not appear from his complaint that the plaintiff explains *how* the use of ballot counting devices, pursuant to statutory authority, is a violation of the New Hampshire Constitution Part II, art. 32. The operative text from that article upon which the plaintiff appears to rely reads: "…in presence of the said selectmen, and of the town or city clerk, in said [election] meetings, sort and count the said votes, and make a public declaration thereof…."[2] The

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[2] The entirety of the Part II, art. 32 reads: The meetings for the choice of governor, council and senators, shall be warned by warrant from the selectmen, and governed by a moderator, who shall, in the presence of the selectmen (whose duty it shall be to attend) in open meeting, receive the votes of all the inhabitants of such towns and wards present, and qualified to vote for senators; and shall, in said meetings, in presence of the said selectmen, and of the town or city clerk, in said meetings, sort and count the said votes, and make a public declaration thereof, with the name of every person voted for, and the number of votes for each person; and the town or city clerk shall make a fair record of the same at large, in the town book, and shall make out a fair attested copy thereof, to be by him sealed up and directed to the secretary of state, within five days following the election, with a superscription expressing the purport thereof.

plaintiff appears to make the logical leap that the sorting and counting of votes can only possibly occur in the presence of selectmen and clerks if done by hand, rather than by the public act of inserting a paper ballot into a ballot counting device and where the results of that count are made public at the end of the night when the poll has closed. There is clearly no prohibitory language relating to ballot counting devices in Article 32, and so, being exceptionally charitable, the plaintiff might be implying that there is an inference that the sorting and counting of votes must be by hand.

13. Absent that speculation by the defendants, the plaintiff does not coherently explain how, in his view, the State Constitution requires that votes be counted by hand. Rather, he invokes constitutional provisions in the abstract without explaining how they support the relief he seeks. It is well established that "[j]udicial review is not warranted for complaints . . . without developed legal argument, and neither passing reference to constitutional claims nor off-hand invocations of constitutional rights without support by legal argument or authority warrants extended consideration." *In re Omega Entertainment, LLC*, 156 N.H. 282, 287 (2007); *see also Keenan v. Fearon*, 130 N.H. 494, 499 (1988) ("[The plaintiff's] off-hand invocations of the State Constitution are supported neither by argument nor authority; we assume they were not seriously presented, and in any case their glancing character warrants no extended consideration."). For this reason alone, Count I must be dismissed.

14. There is not, nor has there ever been, a constitutional right to have one's vote hand counted in New Hampshire. Outside of statutorily described circumstances such as recounts, there is no constitutional provision, statute, or jurisprudence that would support such a right.

15. The determination of how votes are counted—using a ballot counting device or hand counting—is left to the various towns and cities of the State, with many electing to use ordinary ballot boxes and hand counting. "The mayor and aldermen of any city or the selectman of any town…*may* authorize the use of one or more electronic ballot counting devices for the counting of ballots in such city or town…" RSA 656:40 (emphasis added). Put differently, there is no mandate to hand count ballots and there is also no mandate to use ballot counting devices. That choice is a local decision.

16. However, the plaintiff still has a practical solution to have his ballot hand counted. The Election Procedure Manual (EPM), a public document explaining New Hampshire election procedure available on the Secretary of State's website, outlines how a write-in vote must be counted by hand and cannot be counted by the ballot counting device.[3] If the plaintiff wishes to have his vote hand counted, he may simply write in his votes. It places no burden on him to do so.

17. Additionally, as counsel for the Town of Auburn explained to this Court at the September 9 hearing, Auburn utilized both a ballot counting device and a hand count ballot box in the September 13, 2022 Primary Election. Based on this exercise of discretion by the Auburn moderator, voters insistent on having their ballots hand counted were able to use the ballot box and their votes were hand counted at the end of the election. Even if this Court were to rule that the plaintiff had suffered an injury that local officials must work to cure, it was cured prior to the Primary Election and will remain in place for at least the 2022 General Election. This cure is in

[3] "When the diverter is operating, the [ballot counting] device fully counts, except for the write-in, a ballot with a write-in for one race, with the write-in oval filled in, and filling in ovals by the names of the chosen candidates in other races. That ballot is diverted to the write-in/blanks bin under the device. These ballots must be examined to obtain the name of the person(s) who received the write-in vote." New Hampshire Election Procedure Manual: 2022-2023, p. 98.

addition to the plaintiff's ability to hand write in his votes thus requiring a hand count of his ballot per longstanding election practice consistent with the use of AccuVote ballot counting devices.

18. Count I fails because the plaintiff was not deprived of his right to vote. The plaintiff was afforded an opportunity to cast his ballot by inserting it into the ballot counting device, a device used consistent with the local decision regarding the method of counting ballots. Even if the plaintiff was correct in his assertion that New Hampshire law mandates a hand count of all votes, the Town of Auburn took steps to accommodate voters insistent on having their ballots hand counted. Therefore, this claim should be dismissed.

Counts II, IV, V, VI

19. In Count II of his complaint, the plaintiff alleges that RSA 656:40, RSA 656:41, and RSA 656:42 are unconstitutional because they allow the use of electronic voting machines.

20. In Count IV of his complaint, the plaintiff alleges that RSA 21:6, RSA 21:6-a, and RSA 654:1 are unconstitutional because they improperly change the definition of who can vote in the State of New Hampshire. He asserts that in changing the definition of a qualified voter, the Legislature violated the "procedural and substantive due process required by Part II, art. 100 of the New Hampshire Constitution. Cpl. para 65.

21. In Count V of his complaint, the plaintiff alleges that RSA 657 is unconstitutional because it inappropriately expands access to absentee voting, allegedly by legislative action that extended the absentee voting exemptions without a vote by the voters of New Hampshire. Cpl. para 90.

22. In Count VI of his complaint, the plaintiff alleges that the 1976 Amendments resulting from the outcome of Question 8 are repugnant and contrary to the Constitution of New

Hampshire in that the question, as submitted to the voters, "failed to give the voters an accurate idea of the question or questions to be voted upon." Cpl. para 97.

23. In responding to Counts II, IV, V, and VI, the defendants reiterate that the plaintiff has presented no injury of any kind to this Court. Keeping in mind that judicial review is not warranted for complaints that fail to develop legal arguments, and instead rely on passing references to constitutional claims or constitutional rights without support by legal argument or authority, the plaintiff has not presented any evidence that he was deprived of the opportunity to vote. He has not presented any evidence of unlawful vote dilution. And, he has not presented any evidence that his personal due process rights have been aggrieved by New Hampshire's legislative process. For these reasons alone, there is no basis for awarding the plaintiff any kind of relief under the law.

24. Rather than deeply diving into each paragraph of the arguments that the plaintiff raises—which are grievances and strain the ability to derive coherent arguments based on analysis of the law—the defendants will provide a more efficient and practical use of brief summaries of key points of law regarding the plaintiff's claims and the defendants' arguments related to those points.

a. The Legislature's authority to make law and to delegate authority

25. The Legislature's constitutional grant of authority includes the power to define, and to give guidance regarding, constitutional provisions.

> And farther, full power and authority are hereby given and granted to the said general court, from time to time, to make, ordain, and establish, all manner of wholesome and reasonable orders, 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, and for the governing and ordering thereof…

N.H. Const. Part II, Art. 5 (emphasis added). Absent a contradictory constitutional provision or guidance from the judicial branch, the Legislature is well within its constitutional grant of authority to provide further guidance and meaning to words such as "resident." The defendants will expand upon this reality below.

26. The plaintiff is correct in writing that, as a general matter, the Legislature may not abdicate its authority to create law. However, the Legislature may otherwise delegate its powers in certain circumstances. "Two broad rules of law apply in determining whether, and under what circumstances, the legislature has the authority to delegate its legislative powers to the voters. The first is that the legislature is prohibited from abdicating its legislative power." *Opinion of the Justices*, 143 N.H. 429, 441 (1999). "An exception to this rule exists for localities. Legislatures may 'permit the electors of a restricted locality to determine whether the provisions of a completed act…shall become operative or shall be taken advantage of.'" *Id*. at 442 (quoting *People v. Kennedy*, 207 N.H. 533 (1913)).

27. "The second rule applicable to these cases is that the legislature may properly enact a law, the effect of which is contingent upon the occurrence of some future event." *Id*. (citation omitted). "Although '[t]he legislature cannot delegate its power to make a law [,] … it can make a law to delegate a power to determine some fact or state of things upon which the law makes, or intends to make, its own action depend.'" *Id*. (quoting *People ex rel. Thomson v. Barnett*, 344 Ill. 62, 75 (1931)).

28. RSA 656:40 reads, in relevant part, "[t]he mayor and aldermen of any city or the selectmen of any town, subject to the approval of the ballot law commission, may authorize the use of one or more electronic ballot counting devices in such city or town on a trial basis for any

regular or special election and pay the expense of such trial from any available funds." RSA 656:40.

29. RSA 656:41 reads, in relevant part, "[t]he [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." RSA 656:41.

30. RSA 656:42 reads, in relevant part, "[t]he ballot law commission shall 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.

31. All of these provisions are lawful delegations of authority according to the New Hampshire Supreme Court. RSA 656:40 allows localities a choice in whether to use ballot counting devices. RSAs 656:41 and 656:42 outline the responsibilities of a body that assists the Legislature in implementing the Legislature's intent. None of these provisions is an unlawful delegation of authority according to the New Hampshire Supreme Court and none is repugnant or contrary to the Constitution. The plaintiff's claims related to these points of law should therefore be dismissed.

b. Recent jurisprudence regarding the legal definitions of "residence" and "domicile"

32. In September of 2012, New Hampshire voters filed a petition in superior court challenging the following language that had been added to the standard voter registration form:

> In declaring New Hampshire as my domicile, I am subject to the laws of the state of New Hampshire which apply to all residents, including laws requiring a driver to register a motor vehicle and apply for a New Hampshire[] driver's license within 60 days of becoming a resident.

Guare v. State, 167 N.H. 658, 660 (2015). The petitioners argued that this language was confusing because it conflated the statutory definitions of "domicile" and "residence," violating a citizen's constitutional right to vote. *Id*. The case was ultimately decided by the New Hampshire Supreme Court. *Id*.

33. The Supreme Court held that the challenged language unreasonably burdened the fundamental right to vote. *Id*. at 669. The Court reasoned that the language of the form confused "resident" with "domicile." *Id*. at 662. After exploring the statutory definitions of each term, the Court reasoned that, "[t]he basic difference between a 'resident' and a person who merely has a New Hampshire 'domicile,' is that a 'resident' has manifested an intent to remain in New Hampshire for the indefinite future, while a person who merely has a New Hampshire 'domicile' has not manifested that same intent." *Id*. Though this case involved a thorough explanation of these terms and their significance to New Hampshire voting law, no party raised any kind of argument that the Legislature had improperly extended its authority by defining the terms "resident" and "domicile" in the ways that it had.

34. The Court revisited this distinction most recently in *Casey v. New Hampshire Secretary of State*, 173 N.H. 266 (2020). There, the Court addressed several certified questions from the United States District Court for the District of New Hampshire, the first being: "[a]re the definitions of 'resident' and 'residence' in RSAs 21:6 and 21:6-a, as recently amended, effectively the same as the definition of 'domicile' as used in RSA § 654:1, such that one with a New Hampshire 'domicile' is necessarily a New Hampshire 'resident'?" *Id*. at 269.

35. The Court ruled that, as the phrase "for the indefinite future" had been removed from both statutes, "[t]he legislative history of the 2018 amendments to RSA 21:6 and :6-a demonstrates the legislature's intent that individuals satisfying the statutory definition of

‘domicile’ in RSA 654:1, I, also satisfy the statutory definitions of ‘resident’ and ‘residence’ in RSA 21:6 and :6-a.” *Id*. at 276.[4]

36. The cases above are illustrative of the Legislature’s power to define words and provide guidance where the Constitution is silent. Examination of New Hampshire Supreme Court case law on other aspects of election law indicates the same power. In *Town of Hooksett v. Baines*, the Court examined an instance where an official was elected to a third term in violation of Hooksett town charter. 148 N.H. 625, 626 (2002). There, the Court noted that “[b]ecause ‘proper qualifications’ was defined neither in Article 11 nor in the constitution itself, the legislature necessarily had the constitutional authority to define its scope.” *Id*. at 627-28 (quoting *Fischer v. Governor*, 145 N.H. 28, 32 (2000)).

37. New Hampshire’s Supreme Court has accepted that the Legislature has the power to define the scope of “proper qualifications.” *Guare* and *Casey* illustrate that the Legislature has the power to define “resident” and “domicile.” Therefore, any claim related to these points of law should be dismissed.

c. Amendments to the New Hampshire Constitution

38. The New Hampshire Constitution requires:

> “[e]ach constitutional amendment proposed by the general court or by a constitutional convention shall be submitted to the voters by written ballot at the next biennial November election and shall become a part of the Constitution only after approval by two thirds of the qualified voters present and voting on the subject in the towns, wards, and unincorporated places.”

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[4] As the plaintiff cites law and understanding of “inhabitant” that go back to the early 19th century, it is worth noting the significant history showing how the definitions and understanding of “inhabitant,” “citizen,” “resident,” and “domicile” have changed alongside major legal developments in the history of the United States such as *Dred Scott v. Sandford*, 60 U.S. 393 (1857), the passage of the Reconstruction Amendments from 1864-1870, and the passage of the 19th amendment granting women the right to vote in 1920. In 1875, for example, the New Hampshire Supreme Court clearly connected the idea of being an “inhabitant” to the concept of “physical presence” in a manner resembling how “domicile,” “residence,” and “physical presence” are connected today, writing “[t]he word inhabitant *may* mean [not shall be] a resident, or person dwelling and having his home, in any city, town, or place…” *School Dist. No. 2 in Brentwood v. Pollard*, 55 N.H. 503 (1875) (emphasis in original).

N.H. Const. Part II, Art. 100, § c.

39. The plaintiff correctly points out that the New Hampshire Supreme Court has intervened even when amendments have been ratified according to this process. In *Gerber*, the Court intervened where there was 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).

> While we continue to adhere to the proposition that every reasonable presumption is to be indulged in favor of the validity of an amendment to the Constitution following its ratification by the voters, we likewise continue to be governed by the principle that the 'clearly expressed intent' of the voters must prevail over any undisclosed purpose.

Id. (citations omitted).

40. There is no such divergence here. The voting age in New Hampshire is 18 years of age. N.H. Const. Part I, art. 11. Domicile is now required to be eligible to vote in New Hampshire. *Id*. The original article for "Qualifications of Electors" was repealed as it directly contradicted the new domicile amendment. *Id* Part II, art. 13. "Senators, How and by Whom Chosen; Right to Suffrage" was repealed as it directly contradicted the new voting age amendment. *Id* Part II, art. 28. Adding "domicile" to Part II, Articles 29 and 30 was necessary to make those provisions reflect the last sentence of Part I, Article 11, which reads, "[e]very inhabitant of the state, having proper qualifications, has equal right to be elected into office." *Id* Part I, art. 11; Part II, art. 29. "Inhabitants of Unincorporated Places; Their Rights, etc." was repealed and Part I, Article 11 was updated to reflect unincorporated places. *Id* Part I, art. 11; Part II, art. 31. "Secretary of State to Count Votes for Senators and Notify Persons Elected" was updated to reflect the new responsibilities of the secretary of state. *Id* Part II, art. 33.

41. All these changes are reflective of the will of the voters, flowing sensibly from the questions presented.

42. It should also be pointed out that *Gerber* was a decision that came down in January of 1967 reflecting amendments ratified in November of 1966. The need to clarify those amendments was immediate and urgent. Several amendments that were passed close in time to those at issue here were also reviewed by the New Hampshire Supreme Court. *See Opinion of the Justices*, 177 N.H. 310 (1977); *Opinion of the Justices*, 115 N.H. 686 (1975); *Opinion of the Justices*, 115 N.H. 104 (1975). The people of New Hampshire have had nearly 46 years to consider the amendments to the Constitution at issue here as raised by the plaintiff. To the defendants' knowledge, these amendments have gone without challenge in all that time, severely belying the plaintiff's claim that the people of New Hampshire were somehow misled in voting as they did.

43. Finally, the plaintiff notes that these 1976 amendments did not comply with RSA 663:3 when they were presented to voters. New Hampshire Statutes, Title LXIII: Elections, of which RSA 663:3 is a part, was not passed by the Legislature until 1979. The defendants note that the plaintiff is stating that the 1976 amendments did not comply with a law that was not then in existence. RSA 663:3 relates to the form of the ballot related to questions to voters. It is unavailing for the plaintiff to rely on a procedural requirement as to form that was not in place when the 1976 question was presented to voters. Taken to its logical conclusion, this argument by the plaintiff would invalidate *every single* constitutional amendment that was voted on prior to the enactment of RSA 663:3 in 1979. That argument is clearly erroneous. Therefore, given that the statutory requirement did not apply in 1976, any claim related to these points of law should be dismissed.

d. Absentee voting

44. Under Part I, Article II:

> [t]he general court shall provide by law for voting by qualified voters who at the time of the biennial or state elections, or of the primary elections therefor, or of city elections, or of town elections by official ballot, are absent from the city or town of which they are inhabitants, or who by physical disability are unable to vote in person, in the choice of any officer or officers to be election or upon any question submitted at such election.

The New Hampshire Constitution, therefore, directly grants the right to an absentee ballot in prescribed circumstances. As discussed above, it is well within the Legislature's power to provide guidance and define words where the Constitution is silent. The laws that the plaintiff references do nothing more than define and explain words such as "absent" and "physical disability." Such an exercise of authority is not an affront to the plaintiff's rights and is well within the authority of the Legislature. Therefore, any claim related to this point of law should be dismissed.

Count III

45. Plaintiff's Count III refers to the use of ballot counting devices, stating: "[u]ntil and unless a professionally recognized standards [sic] are devolved and implemented to protect any and all changes of previously listed and label [sic] electronic equipment [sic]. Until such lawful standards are implement [sic], the Defendants must be enjoined from using such questionable electronic equipment." Cpl. pages 45-6.

46. To summarize, consistent with the testimony at the hearing for the preliminary injunction and his complaint, the plaintiff's allegation is that ballot counting devices in use in New Hampshire can emit an electrostatic discharge that might cause injury. He believes they should not be used in elections until there are safety standards in place to govern their operation.

47. The plaintiff has presented no evidence supporting this allegation. Instead, he relies on nonspecific claims related to changes to devices that occurred twelve years ago and with no identifiable cases of electrostatic discharge, never mind injury. Furthermore, under existing law the plaintiff's concerns are subject to remediation under Department of Labor safety obligations should safety concerns meet the threshold requirements in statute. As discussed below, the plaintiff has presented no claim that would meet the safety action requirements applicable to ballot counting devices. Therefore, his claims with respect to safety standards fails.

48. The New Hampshire Department of Labor Inspection Division includes a Safety Unit, which obtains its jurisdictional limits from New Hampshire Statutes *Chapter 281-A: Workers' Compensation* and *Chapter 277: Safety and Health of Employees*. The relevant rules related to these chapters that detail the expectations of the laws can be found within Chapter LAB 600: *Safety Programs and Joint Loss Management Committees* and Chapter Lab 1400 *Safety and Health of Employees*. For the most part, jurisdiction is triggered by and directed toward the protection of employees, however in rare instances a report of an injury impacting a nonemployee can lead to an investigation (see RSA 277:15-b).

49. This statutory grant of authority allows Department of Labor safety inspectors to enforce specific safety laws detailed in Lab 1400 and make sure an employer complies with the requirements of the law.

50. For public employers, the Department has additional authority and oversight pursuant to Chapter 277: *Safety and Health of Employees*. In addition to overseeing compliance with specifically detailed safety regulations, during the course of inspections, inspectors who have identified hazards are able to craft individualized safety requirements for employers to follow.

51. RSA 277:17 and RSA 277:18 speak to instances where an inspection revealed a special condition that can pose a hazard to the safety and health of the employees. RSA 277:17 addresses instances where an employer's safety practices, after inspection, were found to be unreasonable or inadequate when applied to the special condition. In these instances, the Department's Commissioner has the authority to modify the requirements to make them adequate to address the specific condition. RSA 277:18 provides that after an inspection, if an inspector identifies a special condition requiring additional safeguards that New Hampshire statutes have yet to specifically require, the Department shall have the power to require, by special order, the adoption of particular safeguards, safety devices, appliances, lighting facilities, or other means as may be reasonable and practicable for the safety and health of the employees.

52. At neither the hearing or in his complaint did the plaintiff identify any injury data or any injury reported pursuant to RSA 281-A:53 from utilizing a ballot counting device. Nor has he identified any report of serious injury or death pursuant to RSA 277:15-b.

53. New Hampshire has no law prohibiting an electronic device from being modified.

54. Although the Department of Labor has the authority to modify or implement additional safeguards when a special condition has been identified requiring additional safeguards, pursuant to RSA 277:32, these additional safeguards and modifications can be appealed by the employer to the superior court for review. Therefore, the Department of Labor must be able to prove that a special condition exists by a preponderance of the evidence. Additionally, the recent development of a special condition is relevant for determining the need for a safeguard.

55. There is *no* evidence—only innuendo and speculation—that a ballot counting device may emit an electrostatic discharge. The plaintiff identifies no instance where that has

actually happened in the twelve years since the modifications were made to the devices, when their ethernet ports were disabled. There is no recent special condition on which to base a Department of Labor safety action.

56. As such, given the lack of any evidence of injury and repeated safe use of these machines for a dozen years, the preponderance standard could not be met under the law and no special condition could be imposed.

57. The plaintiff claims that safety standards must be in place before ballot counting devices can be used, but either was not aware of or failed to describe the existing safety regime relative to electronic equipment. The plaintiff may dislike the outcome of the existing safety regime—which operates according to evidence rather than speculation—but he is incorrect that no regime governing the safety of modified electronic equipment exists.

58. The plaintiff cannot meet his burden to successfully mount a challenge as to Count III as he has not demonstrated any type of injury.

Lack of Standing

59. Standing is an issue of subject matter jurisdiction that may be raised at any time and must be decided as a threshold issue before the case may proceed. *Close v. Fisette*, 146 N.H. 480, 483 (2001) ("A challenge to subject matter jurisdiction may be raised at any time during the proceeding, including on appeal, and may not be waived.").

60. The plaintiff in this case does not have standing for the claims he brings. As such, the defendants respectfully request that their standing arguments be resolved in full prior to any further hearings in this matter.

61. "'In evaluating whether a party has standing to sue, [the court] focus[es] on whether the party suffered a legal injury against which the law was designed to protect.'"

Libertarian Party of N.H. v. Sec'y of State, 158 N.H. 194, 195 (2008) (quoting *Asmussen v. Comm'r, N.H. Dep't of Safety*, 145 N.H. 578, 587 (2000)).

62. "The requirement that a party demonstrate harm to maintain a legal challenge rests upon the constitutional principle that the judicial power ordinarily does not include the power to issue advisory opinions." *Id.* at 195-96.

63. A lack of legal harm may be shown by reference to the remedy a party seeks. *Id.* at 196. Thus, where the relief a plaintiff seeks is for the benefit of another party, the plaintiff has not suffered any legal harm against which the law was designed to protect and lacks standing. *Id.*

64. "[T]o bring a declaratory judgment action, a party is required to meet the standard articulated in RSA 491:22." *Baer*, 160 N.H. at 731.

65. The Court "do[es] not have the authority to circumvent this statutory requirement." *Id.*

66. "In order to have standing under RSA 491:22, a party must claim 'a present legal or equitable right or title.'" *Avery v. N.H. Dep't of Educ.*, 162 N.H. 604, 607 (2011) (quoting RSA 491:22, I).

67. As the New Hampshire Supreme Court reiterated, to have standing under RSA 491:22, the individual plaintiffs "'must show that the facts are sufficiently complete, mature, proximate and ripe to place the party in gear with the party's adversary, and thus to warrant the grant of judicial relief.'" *Carlson v. Latvian Lutheran Exile Church of Boston and Vicinity Patrons, Inc.*, 170 N.H. 299, 303 (Sept. 21, 2017) (quoting *Duncan v. State*, 166 N.H. 630, 645 (2014)).

68. Thus, in *Asmussen*, the New Hampshire Supreme Court held that five out of six intervenors demonstrated standing to sue under RSA 491:22 because: (1) they were subject to the challenged statute; and (2) they timely requested a hearing pursuant to the challenged statute. 145 N.H. at 587-88. Accordingly, the New Hampshire Supreme Court held that these five intervenors had standing to challenge the constitutionality of the statutory hearing process because their cases were "not based on the hypothetical application of the ALS statute, but presented an actual controversy between the department and the intervenors adequate to allow the court to render 'an intelligent and useful decision.'" *Id.* (quoting *Salem Coalition for Caution v. Town of Salem*, 121 N.H. 694, 696 (1981)) (emphasis added).

69. The sixth intervenor was denied standing because "his request was denied as untimely." *Id.* at 588. He, therefore, failed to engage the statutory process at issue and could make only a hypothetical challenge to it. *Id.*

70. The plaintiff here does not have standing as he has not demonstrated any kind of injury in bringing this suit. None of his identified rights have been infringed upon nor has he suffered any harm be it financial, legal, or physical. Therefore, any opinion issued by this Court would be advisory only and not actually addressing a case or controversy properly before this Court. On this ground alone, the plaintiff's complaint should be dismissed in its entirety.

71. If the plaintiff is asserting that while he may make use of a hand count box in the Town of Auburn by insisting on casting a ballot to be hand counted, but other voters may not be allowed this option in other towns and cities, he may not assert the rights of other voters relative to casting a ballot by ballot counting device. To do so, he would be making a standing argument based on association. Simply put, the plaintiff also does not have standing to assert the constitutional rights of others, including individuals with whom he may come into contact related

to voting, under the plain language of RSA 491:22. The statutory language of RSA 491:22 makes no mention of associational standing, and this Court cannot import language into RSA 491:22 permitting associational standing without rewriting the statute. *See, e.g.*, *Balke v. City of Manchester*, 150 N.H. 69, 73 (2003) ("We will not rewrite the statute; that is the province of the legislature.").

72. Moreover, a review of the relief the plaintiff is seeking reveals the lack of any harm to him. As he asserted during the Preliminary Injunction hearing, he instead, on the issue of using a ballot counting devices, is seeking relief for individuals who are not before this Court. *Libertarian Party of N.H.*, 158 N.H. at 196. The plaintiff's claims are therefore derivative in nature, do not belong to him, and cannot be maintained by him under RSA 491:22.

73. Under such circumstances, the plaintiff lacks standing.

74. Incorporating the above analyses of the plaintiff's counts related to failure to state a claim, it is clear the plaintiff is attempting to transform RSA 491:22 into a mechanism for the resolution of hypothetical issues and the airing of generalized grievances.

75. As such, the plaintiff fails to satisfy the standing principles the New Hampshire Supreme Court has established under RSA 491:22:

> The claims raised in any declaratory judgment action must be definite and concrete touching the legal relations of parties having adverse interests. <u>The action cannot be based on a hypothetical set of facts, and it cannot constitute a request for advice as to future cases</u>. Furthermore, the controversy must be of a nature which will permit an intelligent and useful decision to be made through a decree of a conclusive character.

Baer, 160 N.H. at 731 (quoting *Asmussen*, 145 N.H. at 587) (emphasis added).

76. Thus, for all the above reasons, the complaint in this case must be dismissed for lack of standing.

Conclusion

77. The plaintiff has not articulated any injury. Therefore, he has no standing of any kind to bring the present complaint. Nor has he articulated any type of claim for which relief may be granted. There is a vast difference between a recitation of injuries to one's constitutionally guaranteed liberties and a list of disagreements with state law and policy. The plaintiff's complaint is the latter. The plaintiff was not denied the opportunity to vote. Ballot counting devices are being used lawfully. The plaintiff has provided no evidence at all that laws clarifying voting procedures and requirements and ensuring that others can vote have illegally diluted his vote in any way, shape, or form. For all these reasons, the plaintiff's complaint should be denied in its entirety.

WHEREFORE, the defendants respectfully request that this honorable Court:

(A) Dismiss the plaintiff's complaint in its entirety with prejudice; and

(B) Grant any other relief that the Court deems just and proper.

Respectfully submitted;

GOVERNOR CHRISTOPHER T. SUNUNU
ATTORNEY GENERAL JOHN FORMELLA
SECRETARY OF STATE DAVID SCANLAN
SPEAKER SHERMAN PACKARD
PRESIDENT CHUCK MORSE
CHAIRMAN KEITH LECLAIR
ADMINISTRATOR DANIEL GOONAN

By their attorneys

NEW HAMPSHIRE OFFICE OF THE
ATTORNEY GENERAL,

Date: October 3, 2022

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served upon the pro se plaintiff via the Court's electronic filing system.

/s/ Myles Matteson
Myles B. Matteson

Date: October 3, 2022