

THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH

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RULE 7 NOTICE OF MANDATORY APPEAL

This form should be used for an appeal from a final decision on the merits issued by a superior court or circuit court except for a decision from: (1) a post-conviction review proceeding; (2) a proceeding involving a collateral challenge to a conviction or sentence; (3) a sentence modification or suspension proceeding; (4) an imposition of sentence proceeding; (5) a parole revocation proceeding; (6) a probation revocation proceeding; (7) a landlord/tenant action or a possessory action filed under RSA chapter 540; (8) an order denying a motion to intervene; or (9) a domestic relations matter filed under RSA chapters 457 to 461-A other than an appeal from the first final order. (An appeal from the first final order issued in a domestic relations matter filed under RSA chapters 457 to 461-A should be filed on this form.)

1. COMPLETE CASE TITLE AND CASE NUMBERS IN TRIAL COURT

STATE OF NEW HAMPSHIRE, ROCKINGHAM COUNTY, SUPERIOR COURT, Docket No.: 218-2022-CV-00676

2. COURT APPEALED FROM AND NAME OF JUDGE(S) WHO ISSUED DECISION(S)

Rockingham County Superior Court, Judge David W. Ruoff

3A. APPEALING PARTY: NAME, MAILING ADDRESS, E-MAIL ADDRESS, AND TELEPHONE NUMBER.

Daniel Richard, 95 Rockingham Rd. Auburn, N.H. 03032, Idanielrichard@protonmail.com, 603-315-8755

E-Mail address:

Telephone number:

3B. APPEALING PARTY'S COUNSEL: NAME, BAR ID NUMBER, FIRM NAME, MAILING ADDRESS, E-MAIL ADDRESS, AND TELEPHONE NUMBER.

Self represented.

E-Mail address:

Telephone number:

4A. OPPOSING PARTY: NAME, MAILING ADDRESS, E-MAIL ADDRESS, AND TELEPHONE NUMBER.

Chris Sununu, et al. Office of the Governor State House 107 North Main Street Concord, NH 03301.

E-Mail address:

Telephone number:

4B. OPPOSING PARTY'S COUNSEL: NAME, BAR ID NUMBER, FIRM NAME, MAILING ADDRESS, E-MAIL ADDRESS, AND TELEPHONE NUMBER.

Anne M. Edwards, Nh Attorney General's Office-Doj 33 Capitol St, Concord, NH 03301.

E-Mail address: Anne Edwards (anne.m.edwards@doj.nh.gov)

Telephone number:

RULE 7 NOTICE OF MANDATORY APPEAL

5. NAMES OF ALL OTHER PARTIES AND COUNSEL IN TRIAL COURT

David Scanlan, Secretary of State, Atty. Myles Brand Matteson,
John Formella, Attorney General, Atty. Myles Brand Matteson,
Sherman Packard, Speaker of the House, Atty. Matthew Gregory Conley.
Chuck Morse, President of the Senate, Atty. Matthew Gregory Conley.
Keith N. LeClair Chairman of the Board of Selectman, Town of Auburn N.H. Atty. Michael Tierney
Daniel A. Goonan, Town administrator of Auburn, Atty. Pauline Desfosses

6. DATE OF CLERK'S NOTICE OF DECISION OR SENTENCING. ATTACH OR INCLUDE COPY OF NOTICE AND DECISION.

09/12/2022

DATE OF CLERK'S NOTICE OF DECISION ON POST-TRIAL MOTION, IF ANY. ATTACH OR INCLUDE COPY OF NOTICE AND DECISION.

01/19/2023

7. CRIMINAL CASES: DEFENDANT'S SENTENCE AND BAIL STATUS

8. APPELLATE DEFENDER REQUESTED?

YES or NO: **No**

IF YOUR ANSWER IS YES, YOU MUST CITE STATUTE OR OTHER LEGAL AUTHORITY UPON WHICH CRIMINAL LIABILITY WAS BASED AND SUBMIT A CURRENT REQUEST FOR A LAWYER FORM (FINANCIAL STATEMENT). SEE SUPREME COURT RULE 32(4).

9. IS ANY PART OF CASE CONFIDENTIAL?

YES or NO: **No**

IF SO, IDENTIFY WHICH PART AND CITE AUTHORITY FOR CONFIDENTIALITY. SEE SUPREME COURT RULE 12.

10. IF ANY PARTY IS A CORPORATION, LIST THE NAMES OF PARENTS, SUBSIDIARIES AND AFFILIATES.

11. DO YOU KNOW OF ANY REASON WHY ONE OR MORE OF THE SUPREME COURT JUSTICES WOULD BE DISQUALIFIED FROM THIS CASE?

YES or NO: **Yes**

IF YOUR ANSWER IS YES, YOU MUST FILE A MOTION FOR RECUSAL IN ACCORDANCE WITH SUPREME COURT RULE 21A.

12. IS A TRANSCRIPT OF TRIAL COURT PROCEEDINGS NECESSARY FOR THIS APPEAL? SEE SUPREME COURT RULE 15, COMMENT.

YES or NO: **Yes**

IF YOUR ANSWER IS YES, YOU MUST COMPLETE THE TRANSCRIPT ORDER FORM ON PAGE 4 OF THIS FORM.

RULE 7 NOTICE OF MANDATORY APPEAL

13. LIST SPECIFIC QUESTIONS TO BE RAISED ON APPEAL, EXPRESSED IN TERMS AND CIRCUMSTANCES OF THE CASE, BUT WITHOUT UNNECESSARY DETAIL. STATE EACH QUESTION IN A SEPARATELY NUMBERED PARAGRAPH.

~~1. The 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. Such modifications has voided the UL safety certification of every voting machine in this state, therefore every voting machine in this state is no longer safety certified. This issue continues to this day.~~

~~2. The 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. The Plaintiff invoked his right not to be deprived of his life, liberty or property, but by the judgement of his peers or the law of the land. The Plaintiff argues that state has deprived him of lawful election process because the mandatory provision of Constitution of New Hampshire controlling elections have been altered and amended by the N.H. legislature by a legislative fiat without the consent of the voters required by Part I, art 1, Part II, art 100.~~

~~3. The court erred when it failed to rule on the criminal complaint alledging violations of RSA 659:9-a, RSA:659:12, RSA 659:13, RSA 659:40 allowing the state not to answer said complaint. The Town of Auburn did in fact conceded at emergency hearing that they did deny the Plaintiff the right to vote at previous local election, which was the basis of the criminal complaint. The court opinion is not true.~~

~~4. The court erred in its opinion as it ignored all the relevent precedent submitted by plaintiff citing the opinions of the N.H. Supreme Court, in which said court has ruled on the constitutionality of Question 8, sub-question b) (domicile) and sub-question d) on the 1976 ballot and declared them unconstituional.~~

~~5. 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.) The court ignored all the evidence submitted by plaintiff citing the opinions of this Supreme Court, and other relevent precedent. The Court also obstructed the presentment of the plaintiffs evidence.~~

14. CERTIFICATIONS

I hereby certify that every issue specifically raised has been presented to the court below and has been properly preserved for appellate review by a contemporaneous objection or, where appropriate, by a properly filed pleading. To the extent that an unpreserved issue is raised as plain error, I hereby certify that I have specifically identified that issue as plain error in section 13.

/s/ Daniel Richard
Appealing Party or Counsel

I hereby certify that on or before the date below, copies of this notice of appeal were served on all parties to the case and were filed with the clerk of the court from which the appeal is taken in accordance with Supreme Court Rules 5(1) and 26(2) and with Rule 18 of the Supplemental Rules of the Supreme Court.

02/16/2023
Date

/s/ Daniel Richard
Appealing Party or Counsel

RULE 7 NOTICE OF MANDATORY APPEAL

TRANSCRIPT ORDER FORM

INSTRUCTIONS:

1. If a transcript is necessary for your appeal, you must complete this form.
2. List each portion of the proceedings that must be transcribed for appeal, e.g., entire trial (see Supreme Court Rule 15(3)), motion to suppress hearing, jury charge, etc., and provide information requested.
3. Determine the amount of deposit required for each portion of the proceedings and the total deposit required for all portions listed. Do not send the deposit to the Supreme Court. You will receive an order from the Supreme Court notifying you of the deadline for paying the deposit amount to the court transcriber. Failure to pay the deposit by the deadline may result in the dismissal of your appeal.
4. The transcriber will produce a digitally-signed electronic version of the transcript for the Supreme Court, which will be the official record of the transcribed proceedings. Parties will be provided with an electronic copy of the transcript in PDF-A format. A paper copy of the transcript may also be prepared for the court.

PROCEEDINGS TO BE TRANSCRIBED					
PROCEEDING DATE (List each day separately, e.g. 5/1/11; 5/2/11; 6/30/11)	TYPE OF PROCEEDING (Motion hearing, opening statement, trial day 2, etc.)	NAME OF JUDGE	LENGTH OF PROCEEDING (in .5 hour segments, e.g., 1.5 hours, 8 hours)	RATE (standard rate unless ordered by Supreme Court)	DEPOSIT
09/09/22	Emergency hearing	David Rouff	2.5 Hours	X \$137.50	\$
				X \$137.50	\$
				X \$137.50	\$
				X \$137.50	\$
				X \$137.50	\$
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				X \$137.50	\$
				X \$137.50	\$
				X \$137.50	\$
				TOTAL DEPOSIT	\$

PROCEEDINGS PREVIOUSLY TRANSCRIBED					
PROCEEDING DATE (List date of each transcript volume)	TYPE OF PROCEEDING (Motion hearing, opening statement, trial day 2, etc.)	NAME OF JUDGE	NAME OF TRANSCRIBER	DO ALL PARTIES HAVE COPY (YES OR NO)	DEPOSIT FOR ADDITIONAL COPIES
					TBD
					TBD
					TBD

NOTE: The deposit is an estimate of the transcript cost. After the transcript has been completed, you will be required to pay an additional amount if the final cost of the transcript exceeds the deposit. Any amount paid as a deposit in excess of the final cost will be refunded. The transcript will not be released to the parties until the final cost of the transcript is paid in full.

THE STATE OF NEW HAMPSHIRE
SUPERIOR COURT

ROCKINGHAM, SS.

SUPERIOR COURT

Daniel Richard

v.

Daniel Goonan, et al.

No. 218-2022-CV-00676

ORDER ON DEFENDANTS' MOTION TO DISMISS

Plaintiff Daniel Richard has brought suit against Governor Christopher Sununu, Attorney General John Formella, Secretary of State David Scanlan, Speaker of the House Sherman Packard, President of the Senate Chuck Morse, Chairman of the Board of Selectmen for the Town of Auburn Keith LeClair, and Town of Auburn Administrator Daniel Goonan (collectively, "Defendants"), seeking declaratory and injunctive relief as to certain election laws and procedures. See Doc. 5 (Am. Compl.). Defendants move to dismiss. See Doc. 46 (Defs.' Sununu, Formella, Scanlan, Packard, and Morse Mot. Dismiss); Doc. 47 (Defs.' Goonan and Leclair Joinder in Doc. 46). Plaintiff objects. See Doc. 48. For the following reasons, Defendants' Joint Motion to Dismiss is **GRANTED**.

Background

Unless otherwise noted, the following facts are derived from Plaintiff's Amended Complaint, see Doc. 5, or are undisputed background facts. Plaintiff is a voter in the Town of Auburn, New Hampshire. He alleges that the Town denied him his right to vote in the March 2022 election when they only permitted him to vote through an electronic vote counting device, rather than to have his vote hand-counted. Plaintiff asks the

Court to enjoin this requirement. He also seeks to invalidate a number of State election laws related to the use of ballot counting devices, absentee voting, and qualifications for voting in the State. Further, Plaintiff seeks to enjoin the statewide use of these devices, the implementation of the current absentee voting scheme, and any voting by those he claims do not fit the constitutional definition of a “qualified voter.” In addition, Plaintiff claims that amendments to the State Constitution generated as a result of Question 8 from the 1976 statewide ballot (the “1976 Amendments”) were invalidly adopted.

As to the electronic ballot counting devices, Plaintiff alleges that at least some of the devices have been altered such that they are in violation of certain Occupational Safety and Health Administration (“OSHA”) standards. He also alleges that the State lacks required safety and testing standards. At the September 7, 2022 hearing and in his Objection, see Doc. 48 ¶ 4, Plaintiff made clear that his chief concern is safety: he alleges that technical defects create a likelihood that when voters input ballots into these devices, an electrostatic shock could occur, which could fatally injure any voters wearing cardiac pacemakers, automated external defibrillator implants, ear amplification devices, or other similar bodily electronic devices. He does not allege that this has ever happened before. He is also concerned with the devices’ efficacy in accurately counting votes. Defendants dispute these factual allegations.

More broadly, Plaintiff alleges that the legislature exceeded its authority in promulgating statutes related to absentee voting and qualifications for voting in this State such that his right to vote is injured. Plaintiff thus appears to allege injury in the form of vote dilution. He contends that his right to vote has been similarly injured by the (allegedly) invalidly adopted 1976 Amendments.

During a September 7, 2022, hearing on Plaintiff's Emergency Motion to Allow Expert Testimony, counsel for the Town of Auburn represented that the Town would provide a ballot box for voters who prefer to have their vote counted by hand. In his subsequently-filed Objection, see Doc. 48 ¶ 23, Plaintiff alleges that during the September 13, 2022 primary election, the Town failed to provide the ballot box "until election officials went and retrieved a box, putting into doubt the secrecy of the Plaintiff's right to a secret ballot."

Analysis

In ruling on a motion to dismiss, the Court determines whether the allegations "in the plaintiff's pleadings are reasonably susceptible of a construction that would permit recovery." Clark v. New Hampshire Dep't of Emp. Sec., 171 N.H. 639, 645 (2019). The Court "assume[s] the plaintiff's pleadings to be true and construe[s] all reasonable inferences in the light most favorable to" the plaintiff. Id. However, the Court need not assume the truth of allegations which are merely conclusions of law. Id. A complaint is properly dismissed "if the facts pleaded do not constitute a basis for legal relief." Id. at 659–60. In conducting this analysis, the Court may consider the pleadings, as well as "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. Ojo v. Lorenzo, 164 N.H. 717, 721 (2013).

In their motion to dismiss, Defendants persuasively argue that Plaintiff lacks standing to bring some or all of his above-described claims. For example, they note that in seeking to invalidate the use of electronic vote counting devices on a statewide basis based on hypothetical injury, Plaintiff's articulated injuries are merely speculative,

and Plaintiff would be improperly asserting the rights of others while failing to establish standing based on association. See Doc. 46 ¶ 71. Because the Court concludes, as detailed below, that Plaintiff has failed to state a claim upon which relief may be granted, it need not address Defendants' standing arguments.

Defendants also note a number of procedural defects in Plaintiffs' Objection and other filings. See Doc. 57 (Defs.' Reply to Pl.'s Obj.). To the extent such defects exist, given Plaintiff's pro se status, and in light of the questions raised by Plaintiff's legal challenges as it relates to the upcoming election, the Court waives the procedural rules referenced in Defendants' filings. See Sup. Ct. Civ. R. 1(d) ("As good cause appears and as justice may require, the court may waive the application of any rule.").

As to the merits of Defendants' Motion to Dismiss, the Court begins with Count VI, which involves the validity of the 1976 Amendments to the State Constitution, because that determination bears on the remaining claims.

I. Count VI – The Validity of the 1976 Amendments

In Count VI, Plaintiff seeks a declaratory judgment that the 1976 Amendments resulting from Question 8 were invalidly adopted, so the effects of those Amendments are unconstitutional. See Doc. 5 at 46–47. Specifically, Plaintiff challenges the validity of the 1976 Amendments as to Part I, Article 11, and Part II, Articles 13, 28, 30, and 31 of the State Constitution. See id. at 27–34 (citing Gerber v. King, 107 N.H. 495, 499 (1967)). The Court first addresses Plaintiff's arguments which apply to all of the affected constitutional provisions, and then addresses Plaintiff's specific challenges.

Plaintiff first argues that Question 8 was defective because "[a]n ordinary voter could not have understood multiple questions as proposed or the outcome of a single

yes vote, or a yes vote for one question and no vote for another.” Doc. 5 at 29.

Defendants disagree. See Doc. 46 ¶¶ 40–42. Question 8¹ stated:

8. 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.

Doc. 8 (Def’s Ex. A). Exhibit A also reflects a single “Yes ” above a single “No ” in the margin to the right of where Question 8 was presented in the Voters’ Guide. See id.

“[E]very reasonable presumption is to be indulged in favor of the validity of an amendment to the Constitution following its ratification by the voters. Gerber, 107 N.H. at 499. However, “the ‘clearly expressed intent’ of the voters must prevail over any undisclosed purpose.” In Gerber, the Supreme Court concluded that certain proposed amendments were not effectively approved by the voters because “the purport of the language which [the voters] ratified and adopted . . . was not the effect of the amendments . . . which the Legislature proposed.” Id.

Upon review, it is reasonable to presume that voters understood that answering “Yes” to Question 8 would mean that a “Yes” answer applies to all five of the proposed changes. See Gerber, 107 N.H. at 499. Thus, the “clearly expressed intent” of the voters in answering “Yes” to this question was that all five listed changes would be

¹ The Court assumes for the purposes of this Order that Defendant’s Exhibit A accurately depicts Question 8 as it was presented to the voters in 1976. See Clark, 171 N.H. at 645.

made. See id. While Plaintiff may think it imprudent to amend the Constitution through such an all-or-nothing approach, this does not render invalid the amendments generated by the passage of Question 8. Thus, the Court declines to invalidate the 1976 Amendments on this basis.

Plaintiff also contends that Question 8 was defective in that it failed to provide the text of the proposed amended article of the Constitution, as required by RSA 663:3. See Doc. 5 at 34. As Defendants correctly point out, however, RSA 663:3 was not passed until 1979, see Doc. 46 ¶ 43; see also RSA 663:3, and the statute contains no indication of retroactive effect. The Court therefore declines to invalidate the Amendments resulting from Question 8 on this basis.

Next, Plaintiff queries why voters were presented with certain questions where the proposed textual changes would not alter the state of the law. See Doc. 5 ¶¶ 107, 113, 121. Plaintiff's own Exhibit A, the Voters' Guide, answers this question: to clarify matters which were not "clear in the Constitution." See Doc. 8 (Ex. A). Plaintiff presents no reason why a constitutional amendment to clarify the law is invalid. Thus, the Court declines to invalidate any of the implicated provisions on these grounds.

Plaintiff further argues, in essence, that the 1976 Amendments drafted as a result of Question 8 do not fairly follow from the language presented to the voters in the corresponding sections of the Voters' Guide and thus the Amendments are invalid. See Doc. 5 ¶¶ 96–128 (citing Gerber, 107 N.H. at 499). Defendants maintain that under Gerber, there is no divergence between the language which the voters ratified and the effect of the amendments as proposed. See Doc. 46 ¶¶ 39–41. The Court will address the parties' arguments with respect to each of the challenged provisions, in turn.

A. Question 8(a) – Voting Age

The Court is unclear as to whether Plaintiff raises additional challenges related to Question 8(a) beyond the violation of RSA 663:3 discussed above, but Plaintiff states that “Article 11 of Part I was not in the voter guide which was repealed with no consent.” Doc. 5 at 34. To the extent Plaintiff contends that the 1976 Amendments did not fairly follow from the language of Question 8(a), or that Question 8(a) “repealed” Part I, Article 11, the Court disagrees. First, Part I, Article 11 was not “repealed.” See N.H. Const. Pt. I, Art. 11. Further, Question 8(a) asked whether voters were in favor of making a change to election law that would reduce the minimum age of voters to eighteen. See Doc. 8 (Ex. A). Part I, Article 11 states, following the 1976 Amendments, “[a]ll elections are to be free, and every inhabitant of the state of 18 years and upwards shall have an equal right to vote in any election. . . .” N.H. Const. Pt. I, Art. 11. The clearly expressed intent of the voters was that the voting age be reduced to eighteen, and that is exactly what happened. See Gerber, 107 N.H. at 499. Thus, unlike in Gerber, there is no divergence between the meaning of the language presented to the voters in Question 8(a) and the effect of the amendment as to Part I, Article 11. See id.

B. Question 8(b) and constitutional provisions regarding “inhabitants”

With respect to Question 8(b), Plaintiff clearly asserts the argument that the way the drafters of the 1976 Amendments implemented the results of Question 8(b) did not reflect the intent of the voters. See Doc. 5 ¶¶ 30–32, 34. Question 8(b) asked voters whether they were in favor of making a change relating to elections “to make domicile rather than being an inhabitant a prerequisite for the voting privilege.” Doc. 8 (Ex. A). Plaintiff contends that in various articles, the drafters improperly replaced “dwelleth and

hath his home” or similar language with the word “domicile,” where they only should have replaced the word “inhabitant” with “domicile.” See Doc. 5 at 31–32. In the Court’s view, there is no legal significance to this alleged discrepancy because prior to the 1976 Amendments, “inhabitant” was defined, in part, in relation to where someone “dwelleth and hath his home.” See N.H. Const. Part II, Art. 30 (Amended 1976). Thus, the intent of the voters was achieved where the drafters of the 1976 Amendments replaced the word “inhabitant” with the word “domiciled” and where they replaced “dwelleth and hath his home” or similar language with “domiciled.” See Gerber, 107 N.H. at 499.

In sum, the Court agrees with Defendants that there is “no divergence between the language which the voters ratified and adopted and the effect of the amendments which the Legislature proposed.” See Doc. 46 ¶¶ 39 – 40; see also Gerber, 107 N.H. at 499. Thus, particularly in light of the presumption in favor of the validity of an amendment to the Constitution following its ratification by the voters, see Gerber, 107 N.H. at 499, the Court concludes that even assuming the truth of Plaintiff’s factual allegations and construing all reasonable inferences in his favor, see Clark, 171 N.H. at 645, none of Plaintiff’s challenges to the validity of the 1976 Amendments warrant relief.

The Court also notes that Plaintiff invokes a number of other constitutional provisions and legal principles, including, for example, Article 1, §§ 2 and 6, and the 9th, 10th, and 14th Amendments to the United States Constitution. See, e.g., Doc. 5 at 27. To the extent Plaintiff raises additional challenges to the 1976 Amendments not addressed in this Order, the Court concludes that these arguments are not sufficiently developed to warrant judicial review. See In re Omega Ent., LLC, 156 N.H. 282, 287

(2007) (“Judicial review is not warranted . . . 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.”)

For the foregoing reasons, the Court concludes that Count VI of Plaintiff’s Complaint, seeking to invalidate the 1976 Amendments, must be dismissed.

II. Counts II, IV, and V

In Counts II, IV, and V of his Complaint, Plaintiff asserts that statutes related to elections and voting procedures are unconstitutional, arguing the legislature lacked authority to pass them in the absence of a constitutional amendment. See Doc. 5. He further contends that to the extent the legislature had such power, it unconstitutionally delegated that power to the ballot law commission. See id. Defendants counter that the legislature has the “power to define words and provide guidance where the Constitution is silent” and that the legislature has not engaged in unconstitutional delegation of authority here. See Doc. 46 ¶¶ 25 – 37, 44. The Court agrees with Defendants.

As Defendants point out, Part II, Article 5 provides the legislature with the power “. . . to make, ordain, and establish, all manner of wholesome and reasonable orders, laws, statutes, ordinances, directions, and instructions . . . not repugnant or contrary to this constitution.” N.H. Const. Pt. II, Art. 5. Where a word or phrase is not defined in the State Constitution, the legislature necessarily has the constitutional authority to define the terms and their scope through reasonable regulation. See Fischer v. Governor, 145 N.H. 28, 32 (2000); State v. Sullivan, 101 N.H. 429, 430 (1958) (holding the validity of this proposition in the context of undefined words in Part I, Art. 11). With

this legal framework in mind, the Court considers the specific issues raised in Plaintiff's Complaint.

A. Count II – use of electronic voting machines

In Count II, Plaintiff essentially argues that the only constitutionally permissible manner of counting votes under Part II, Article 32 of the State Constitution is for the selectmen, moderator, and town or city clerk to count the votes by hand, and thus the legislature's permitting of the use of electronic ballot counting devices in RSA 656:40, et seq. is repugnant or contrary to the constitution in the absence of a constitutional amendment. See Doc. 5 at 3–4, 12–16. He further maintains that, to the extent the legislature had the power to authorize the use of these devices, it unconstitutionally delegated that power to the ballot law commission. See id.

In the Court's reading, Part II, Article 32 does not require a particular method through which the public officials are to count ballots.² N.H. Const. Pt. II, Art. 32. Thus, the legislature has the authority to permit the use of electronic ballot counting devices because the Constitution is silent on this matter. See N.H. Const. Pt. II, Art. 5; Fischer v. Governor, 145 N.H. 28, 32 (2000); State v. Sullivan, 101 N.H. 429, 430 (1958).

As to the issue of delegation vis-à-vis RSA 656:40–42, the Court agrees with

² Part II, art. 32 states:

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.

N.H. Const. Pt. II, Art. 32.

Defendants that “[a]ll of these provisions are lawful delegations of authority.” Doc. 46 ¶ 27. While the legislature is generally “prohibited from abdicating its legislative power . . . the legislature may enact laws to take effect on a future event.” Opinion of the Justs., 143 N.H. 429, 441 (1999) (cleaned up). This means that the legislature “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. at 443 (cleaned up). Likewise, the legislature “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 441 (cleaned up). Moreover, “[i]t 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 Justs., 121 N.H. 552, 557 (1981). While “the legislature may not . . . delegate unlimited rulemaking authority to administrative agencies,” the legislature may delegate certain decision-making and rulemaking authority to administrative agencies provides that it “declare[s] a general policy and prescribe[s] standards for administrative action.” Id.

In RSA 656:40, the legislature permitted electors of “any town” to “authorize the use of . . . ballot counting devices” RSA 656:40. Thus, RSA 656:40 is a permissible delegation because the legislature has permitted the electors of a locality to determine whether the provisions of the act shall become operative (i.e. whether to use the devices). See Opinion of the Justs., 143 N.H. at 441. In RSA 656:41, the legislature made the use of such devices contingent on approval by the ballot law commission, and required the commission to engage in certain procedures and consider certain facts in deciding whether to approve the use of such devices. See

RSA 656:41. Thus, in promulgating RSA 656:41, the legislature permissibly delegated a power to determine some fact or state of things upon which the law makes its own action depend. See Opinion of the Justs., 143 N.H. at 443.

In RSA 656:42, the legislature, inter alia, required the ballot law commission to engage in administrative rulemaking “to ensure the accuracy of electronic ballot devices” and procedures for testing the devices prior to each election. RSA 656:42. Thus, the legislature delegated to the ballot law commission the power to promulgate rules necessary for the proper execution of the laws and did not grant unlimited rulemaking authority, but rather, declared a general policy and prescribed standards for administrative action. See Opinion of the Justs., 121 N.H. at 557.

In light of the foregoing, the Court concludes that none of the identified statutes are an unconstitutional delegation of authority. Thus, the Court finds no basis to invalidate RSA 656:40–42. Accordingly, Count II must be dismissed because it fails to state a claim upon which relief may be granted. See Clark, 171 N.H. at 645.

B. Count IV

In Count IV, Plaintiff asserts that “[t]he legislature has changed the constitutional definition of a qualified voter by statute, violating procedural and substantive due process required by Part II, art. 100 to amend” the Constitution, and he seeks a declaratory judgment that RSA 21:6, RSA 21:6-a, and RSA 654:1 are unconstitutional due to “comingling the word resident and inhabitant.” See Doc. 5 at 17–24, 46. Plaintiff appears to argue that because the 1976 Amendments were not properly ratified, voters still must be “inhabitants,” and thus these statutes improperly amended the constitution without consent of the voters. See Doc. 5 at 5, 17–27.

As explained supra, the 1976 Amendments validly made “domicile rather than being an inhabitant a prerequisite for the voting privilege.” Doc. 8 (Ex. A). Similarly, as explained supra, where a word or phrase is not defined in the Constitution, the legislature necessarily has the authority to define the terms and their scope through reasonable regulation. See, e.g., Fischer, 145 N.H. at 32. The word “domicile” is not defined in the State Constitution, so the legislature may define it through reasonable regulation. See id. In light of the foregoing, the Court finds no basis to invalidate RSA 21:6, RSA 21:6-a, or RSA 654:1. Plaintiff therefore has failed to state a claim upon which relief may be granted. See Clark, 171 N.H. at 645. Accordingly, Count IV must be dismissed. See id.

C. Count V

In Count V, Plaintiff seeks declaratory and injunctive relief striking down RSA Chapter 657 because it unconstitutionally expands the reasons for which a voter may vote by absentee ballot under Part I, Article 11. See Doc. 5 at 24 – 27, 46. Although Plaintiff refers to “Chapter 657” generally, the only specific provision he discusses is RSA 657:1. See id. at 25–26. In moving to dismiss this count, Defendants note that this statute, like those in Counts II and IV, “define[s] words where the Constitution is silent.” Doc. 46 ¶ 44. Defendants continue, “[t]he laws that the plaintiff references do nothing more than define and explain words such as ‘absent’ and ‘physical disability.’” Id. The Court agrees with Defendants. As explained above, the legislature is well within its authority to define through reasonable regulation undefined terms in the State Constitution. See, e.g., Fischer, 145 N.H. at 32. Finding no basis to invalidate RSA 657:1, the Court concludes that Plaintiff has failed to state a claim for relief. See Clark,

171 N.H. at 645. Consequently, Count IV must be dismissed. See id.

III. Count I

In Count I, Plaintiff alleges that he was denied the right to vote when the Town of Auburn only allowed him to vote using electronic vote counting devices, and did not permit him to have his vote counted by hand. Doc. 5 at 3, 10–11. In support of this argument, Plaintiff contends that Part II, Article 32 requires that votes be counted by hand, and thus prohibits the use of electronic vote counting devices. See id. at 10; see also Doc. 48 ¶ 19 (arguing that Opinion of the Justices, 53 N.H. 640 (1873) supplies a right to have one’s vote counted by hand). Defendants respond that “[t]here is not, nor has there ever been, a constitutional right to have one’s vote hand counted in New Hampshire.” Doc. 46 ¶ 14.

First, the Court notes Plaintiff’s admission that the Town of Auburn permitted him to have his vote counted by hand at the September 13, 2022 primary election. Thus, at least as to that election, Plaintiff’s claim under Count I is moot. See In re O’Neil, 159 N.H. 615, 624 (“a matter is moot when it no longer presents a justiciable controversy because issues involved have become academic or dead”).

Moreover, as the Court observed supra, Part II, art. 32 does not establish a method by which votes must be counted. See N.H. Const. Pt. II, Art. 32. Further, the Court disagrees with Plaintiff’s reading of Opinion of The Justices—this case did not establish a constitutional right to have one’s vote counted by hand. 53 N.H. at 640–44. Rather, it involved the governor’s duties in receiving declarations of the returns of votes and investigating their accuracy. Id. at 641. In the absence of any law clearly establishing a constitutional right to have one’s vote counted by hand, the Court

declines to create one here. Thus, assuming the truth of Plaintiff's factual allegations in Count I, this claim is not reasonably susceptible of a construction that would permit recovery, and is therefore dismissed. See Clark, 171 N.H. at 645.

IV. Count III

In Count III, Plaintiff argues that RSA 656:40–42 are repugnant or contrary to the constitution because they permit the use of electronic vote counting devices which lack testing and safety standards, and some or all of these devices allegedly violate certain OSHA standards. See Doc. 5 at 17, 45–46 (citing 29 CFR 1910.399, which provides definitions related to the regulation of “electrical safety requirements that are necessary for the practical safeguarding of employees in their workplaces”). The Court is unpersuaded. As explained above, RSA 656:42 (which Plaintiff seeks to invalidate) requires the ballot law commission to establish testing procedures “to ensure the accuracy of electronic ballot devices,” and mandates the testing of each device before each election. RSA 656:42. Because Plaintiff's assertion that the State lacks testing requirements is a conclusion of law, the Court need not (and does not) assume its truth. See Clark, 171 N.H. at 645.

More fundamentally, Plaintiff cites no authority for the broad proposition that the alleged existence of OSHA violation(s) would create a private cause of action for non-employees, or that the remedy in such a case would be to invalidate the statute authorizing the use of the devices at issue on constitutional grounds. Indeed, in order for an OSHA violation to render use of such devices repugnant or contrary to the State Constitution, the relevant OSHA regulation would itself need to have constitutional footing. To the Court's knowledge, the State has not amended the Constitution to

include OSHA regulations or other similar standards. Thus, Plaintiff fails to state a claim upon which relief may be granted, see Clark, 171 N.H. at 645, and Count III must be dismissed.

Conclusion

To the extent that Plaintiff raises additional arguments not addressed in this Order, the Court concludes that these constitutional challenges are not sufficiently developed to warrant judicial review. See In re Omega Ent., LLC, 156 N.H. at 287. Consistent with the foregoing, Defendants' motion to dismiss Plaintiff's Complaint for failure to state a claim is **GRANTED**.

SO ORDERED.

Date: November 10, 2022



Hon. David W. Ruoff

Clerk's Notice of Decision
Document Sent to Parties
on 12/01/2022

THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH
<http://www.courts.state.nh.us>

Court Name: Rockingham - Superior Court
Case Name: Daniel Richard v Daniel A. Goonan, Town Administrator Town of Auburn, et al
Case Number: 218-2022-CV-00676
(if known)

MOTION: Motion to Reconsider

1. I Daniel Richard am filing this motion on my own behalf
AND/OR

I am a person authorized by court rules to appear on behalf of another in this case. I am filing this motion on behalf of _____

2. The facts supporting this motion are:

Now Come the Plaintiff, Daniel Richard, in above-numbered and entitled action, moves the
Court for a Motion for Reconsideration of its opinion in this matter. The case law
relevant to this motion is extensive. The May it please the court the Plaintiff offers
the following Memorandum of law in support of his Motion to reconsider the courts order
[See Attachment(s), item 'Item 2' (continued)]

3. With this motion, I am requesting the following relief:

WHEREFORE, the Plaintiff respectfully motions this Court to grant Plaintiff's Motion to
Reconsider the Courts Order on Defendants Motion to Dismiss.

4. The other party does does not agree with the relief requested in this motion.

OR

I was unable to or did not obtain the other party's opinion on this motion because:

I did not obtain the other parties consent.

TurboCourt.com Form Set #7481519

Case Name: Daniel Richard v Daniel A. Goonan, Town Administrator Town of Auburn, et al

Case Number: 218-2022-CV-00676

MOTION:

For non e-filed cases:

I state that on this date I am mailing by U.S. mail, or Email (only when there is a prior agreement of the parties to use this method), or hand delivering a copy of this document to:

_____ or _____
Other party Other party's attorney

OR

For e-filed cases:

I state that on this date I am sending a copy of this document as required by the rules of the court. I am electronically sending this document through the court's electronic filing system to all attorneys and to all other parties who have entered electronic service contacts (email addresses) in this case. I am mailing or hand-delivering copies to all other interested parties.

Daniel Richard
Name of Filer

/s/ Daniel Richard 12/12/22
Signature of Filer Date

Law Firm, if applicable Bar ID # of attorney

(603) 315-5755
Telephone

95 Rockingham Rd.
Address

1danielrichard@protonmail.com
E-mail

Auburn, NH 03032
City State Zip code

FOR COURT USE ONLY

Upon review of the pleadings and prior order, the Court is not convinced that it made an error of law or misapprehended any factual issues. The Motion is Denied.



Honorable David W. Ruoff
January 19, 2023

Clerk's Notice of Decision
Document Sent to Parties
on 01/19/2023

To Motion to Reconsider

Item 2 (continued)

in this matter. See attached Plaintiff's Memorandum of law

Service Information

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Other party's attorney: Michael J. Tierney

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Other party: John Formella, Attorney General

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Other party: Keith N. Leclair, Chairman Board of Selectman Town of Auburn

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Other party's attorney: Anne M. Edwards

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Other party: Sherman Packard, Speaker of the House

If the item that this Attachment concerns is made under penalty of perjury, all statements in this Attachment are made under penalty of perjury.

To Motion to Reconsider

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Other party's attorney: Myles Brand Matteson

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Other party: Daniel A. Goonan, Town Administrator Town of Auburn

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Other party: Chuck Morse, President of the Senate

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Other party's attorney: Matthew Gregory Conley