THE STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS
SOUTHERN DISTRICT

SUPERIOR COURT

Docket No. 226-2022-CV-00233

603 Forward; Open Democracy Action; Louise Spencer; and Edward R. Friedrich
v.
David M. Scanlan, in his official capacity as the New Hampshire Secretary of State; and John M. Formella, in his official capacity as the New Hampshire Attorney General

and

Docket No. 226-2022-CV-00236

Manuel Espitia, Jr. and Daniel Weeks
v.
David Scanlan, in his official capacity as New Hampshire Secretary of State; and John Formella, in his official capacity as New Hampshire Attorney General

ORDER ON DEFENDANTS' MOTION TO DISMISS

The plaintiffs have brought these actions challenging the constitutionality of a newly-enacted law affecting voters who are unable to prove their identity prior to voting. See Laws 2022, ch. 239 ("SB 418"). The defendants now move to dismiss on the basis of standing and ripeness.[1] The plaintiffs object. The Court initially held a hearing on this motion on January 30, 2023. Thereafter, on June 23, 2023, the Court issued an order in which it requested the parties to address the scope of SB 418. After the Court received the requested briefing, it held a further hearing on September 11, 2023. For the reasons that follow, the defendants' motion to dismiss is GRANTED.

Background

The governor signed SB 418 into law on June 17, 2022, and it took effect on January 1, 2023. Prior to the enactment of SB 418, "New Hampshire law allow[ed] for

[1] The intervenor, the New Hampshire Republican State Committee, joins in the defendants' motion.

votes to be cast and counted by signing an affidavit, even when the voter fail[ed] to produce documents to prove his or her identity[.]" Laws 2022, ch. 239:1, II. In the legislature's view, "[a]llowing [these] votes to count in an election enable[d] the corruption of New Hampshire's electoral process." Laws 2022, ch. 239:1, I. SB 418 was thus purportedly enacted "to restore the integrity of New Hampshire elections." Id.

In (alleged) furtherance of that goal, SB 418 created a new type of ballot known as an "affidavit ballot" for voters who use a challenged voter affidavit[2] to prove their identity prior to voting. See RSA 659:13; RSA 659:23-a. The affidavit ballot is distinct from a traditional ballot. For instance, affidavit ballots are numbered and the number on each ballot is associated with the name of the voter who cast that particular ballot. And, unlike traditional ballots, after an affidavit ballot is cast, it is "placed in a container designated 'Affidavit Ballots,' and hand counted after polls have closed." RSA 659:23-a, IV. If a voter is required to use an "affidavit ballot," the voter is also given "an affidavit voter package," RSA 659:23-a, II, which includes a prepaid overnight mail envelope, a list of "the documents required to qualify to vote in the state of New Hampshire," and a letter indicating which "qualifying documents were not provided" at the polling location, RSA 659:23-a, II(b). The voter must then "return their copy of the . . . letter and a copy of any required documentation to the secretary of state in the provided . . . envelope within 7 days of the date of the election in order for the ballot to be certified," RSA 659:23-a, II(b), a process informally known as "curing." If the voter fails to return the necessary documentation within the seven-day period, "[t]he votes cast on [his or her]

[2] Challenged voter affidavits are used when a voter is unable to prove his or her identity with photo identification, and the election officials are unable to verify the voter's identity through other means, such as personal recognition, see RSA 659:13, II(b), or perhaps using "nonpublic data in the statewide centralized voter registration data," RSA 659:13, II(d).

affidavit ballot[] shall be deducted from the vote total for each affected candidate or each affected issue," RSA 659:23-a, V, and the voter will be referred to "the New Hampshire attorney general's office for investigation," RSA 659:23-a, VII.

Shortly after the governor signed SB 418, the plaintiffs brought these actions challenging the constitutionality of SB 418.[3] The plaintiffs claim that SB 418 violates several provisions of the New Hampshire Constitution, including Articles 1, 2, 2-b, 10, 11, 12, 14, 15 of Part I, and Article 32 of Part II. They seek a declaration "that SB 418 violates the New Hampshire Constitution," (233 Compl. Prayer ¶ A), as well as a permanent injunction enjoining the defendants, "their respective agents, officers, employees, successors, and all persons acting in concert with each or any of them from implementing, enforcing, or giving any effect to SB 418," (id. Prayer B). Several of the plaintiffs are individuals who are already registered to vote in New Hampshire, including: (1) Louise Spencer; (2) Edward Friedrich; (3) Manuel Espitia; and (4) Daniel Weeks. In addition, there are two organizational plaintiffs: 603 Forward and Open Democracy Action ("ODA"). 603 Forward ("603") is a domestic non-profit corporation. Its mission "is, above all else, the maintenance and promotion of a healthy democracy." (Id. ¶ 10.) To that end, it runs a "sophisticated voter education program," in which it helps individuals register to vote. (Id.) ODA is also a domestic non-profit corporation. Its "mission is to bring about and safeguard political equality for the people of New Hampshire." (Id. ¶ 11.) ODA "pursues its mission through significant voter education efforts that focus on informing prospective voters about voter registration rules and advising voters on how to vote either through absentee ballot or in person." (Id. ¶ 12.)

[3] The Court will refer to the complaint filed in Docket No. 226-2022-CV-00233 as the "223 Complaint" and the complaint filed in Docket 226-2022-CV-00236 as the "236 Complaint."

Discussion

The defendants move to dismiss the plaintiffs' claims on the basis of standing. "Generally, in ruling upon a motion to dismiss, the trial court is required to determine whether the allegations contained in the [plaintiffs'] pleadings are sufficient to state a basis upon which relief may be granted." Avery v. N.H. Dep't of Educ., 162 N.H. 604, 606 (2011). "To make this determination, the [C]ourt would normally accept all facts pled by the [plaintiffs] as true, construing them most favorably to the [plaintiffs]." Id. However, when as here, the issue is "the plaintiff[s'] standing to sue," the Court "must look beyond the allegations and determine, based upon the facts alleged, whether the plaintiff[s] ha[ve] demonstrated a right to claim relief." Carrigan v. N.H. Dep't of Health & Human Servs., 174 N.H. 362, 366 (2021).

A. Individual Plaintiffs

The defendants first argue that the individual plaintiffs lack standing because "[n]o allegations have been pled . . . that SB 418 has or will interfere with [their] right to vote in any way." (Defs.' Mot. ¶ 22.) In response, the individual plaintiffs claim that they "have standing to challenge SB 418 under the taxpayer standing amendment in Part 1, Article 8 of the state constitution." (603's Obj. at 8.) That provision provides, in pertinent part:

> The public also has a right to an orderly, lawful, and accountable government. Therefore, any individual taxpayer eligible to vote in the State shall have standing to petition the Superior Court to declare whether the State or political subdivision in which the taxpayer resides has spent, or has approved spending, public funds in violation of a law, ordinance, or constitutional provision. In such a case, the taxpayer shall not have to demonstrate that his or her personal rights were impaired or prejudiced beyond his or her status as a taxpayer.

N.H. Const. pt. I, art. 8 (emphasis added). Under this provision, a plaintiff may "call on the courts to determine whether a specific act or approval of spending conforms with the law." Carrigan, 174 N.H. at 370. However, this provision does "not empower courts to audit a governmental body to determine whether its policy decisions regarding the allocation of resources are prudent or sufficient to comply with legal requirements." Id.

Here, the plaintiffs allege that "[t]he Fiscal Note attached to SB 418 indicates that the law will require the State to expend funds to prepare affidavit ballot verification packets, to pay for postage for returned verification packets, and to disburse overtime pay for Department of State workers required to administer the law." (233 Compl. ¶ 111.) The estimated amount of these expenditures is $48,000 in fiscal year 2023 and $72,000 in fiscal year 2024. (Id.) The plaintiffs generally maintain that these specific expenditures will be incurred to carry out an unconstitutional law—SB 418—and therefore they have taxpayer standing to challenge SB 418. For their part, the defendants argue that the plaintiffs are not challenging a "specific spending action," but the legality of the entire voting law. (Defs.' Mot. ¶ 27.) The defendants further note that "SB 418 is not an appropriation or authorization statute, and the legislation is not related to government spending." (Id.) Consequently, the defendants maintain that the individual plaintiffs do not have taxpayer standing under Part I, Article 8 to challenge SB 418. After careful consideration, the Court agrees with the defendants.

The Court does not read Part I, Article 8 "as permitting a group to challenge any legislation merely because of an incidental expenditure of state funds." Shavers v. Kelley, 267 N.W.2d 72, 81 (Mich. 1978). Indeed, as "almost all legislation involves some public spending," id., and "most activities can be viewed as having some

relationship to expenditures," Rudder v. Pataki, 711 N.E.2d 978, 982 (N.Y. 1999), such a broad reading of Part I, Article 8 "would create standing for any citizen who had the desire to challenge virtually all governmental acts," id., and "our state courts would be transformed into forums in which to air generalized grievances about the conduct of state government," Reeves-Toney v. Sch. Dist. No. 1 in City & Cnty. of Denver, 442 P.3d 81, 87 (Colo. 2019); cf. Hein v. Freedom From Religion Found., Inc., 551 U.S. 587, 593 (2007) ("[I]f every federal taxpayer could sue to challenge any Government expenditure, the federal courts would cease to function as courts of law and would be cast in the role of general complaint bureaus."). Rather, Part I, Article 8 taxpayer standing only exists if the plaintiffs "demonstrate a sufficient nexus" between their claims and the "fiscal activities of the State." Rudder, 711 N.E.2d at 982; see also Jones v. Samora, 395 P.3d 1165, 1173 (Colo. Ct. App. 2016) (holding that plaintiff lacked taxpayer standing where he did not show "a clear nexus between his status as a taxpayer" and the challenged activity (cleaned up)).

In this case, the plaintiffs have not identified any specific funds earmarked by the legislature to carry out SB 418. Cf. Conrad v. City & Cnty. of Denver, 656 P.2d 662, 667 (Colo. 1982) (holding that taxpayer had standing to challenge funds spent on religious nativity scene where city "had admitted that funds are appropriated for the display and storage of the nativity scene"). Nor do the plaintiffs "seek a declaration that any of the [potential] expenditures identified in [their] complaint [are] illegal." Carrigan, 174 N.H. at 374. Rather, the thrust of the plaintiffs' complaint is that SB 418 as a whole is an infringement on a variety constitutional rights belonging to other New Hampshire citizens. While it is true that there may be incidental postage and staffing costs incurred

by the Secretary of State's Office in executing SB 418, these minimal expenditures bear little to no relationship to the merits of the plaintiffs' claims. In other words, these limited expenditures are too attenuated from the alleged constitutional violations flowing from SB 418 to confer taxpayer standing in this case. See Hickenlooper v. Freedom from Religion Found., Inc., 338 P.3d 1002, 1008 (Colo. 2014) (holding that use of "public funds to pay for the paper, hard-drive space, postage, and personnel necessary to issue" an allegedly unconstitutional religious proclamation were "incidental overhead costs" that were insufficient to confer taxpayer standing); see also Altman v. Bedford Cent. Sch. Dist., 245 F.3d 49, 74 (2d Cir. 2001) (noting that "[n]early all governmental activities are conducted or overseen by employees whose salaries are funded by tax dollars" and "[t]o confer taxpayer standing on such a basis would allow any municipal taxpayer to challenge virtually any governmental action at any time"); Andrade v. Venable, 372 S.W.3d 134, 139 (Tex. 2012) ("A government employee's time spent on the allegedly illegal activity must be significant to serve as a basis for taxpayer standing.").

In short, the Court does "not believe that [Part I, Article 8] is intended to give plaintiffs standing to test the constitutionality of an entire act when the expenditure of funds alleged is incidental to its implementation." Shavers, 267 N.W.2d at 81. As that is precisely the case here, the Court finds that the individual plaintiffs lack taxpayer standing to bring this action pursuant to Part I, Article 8 of the State Constitution. The defendants' motion to dismiss their claims is therefore GRANTED.[4]

[4] The Court previously asked the parties to brief whether the individual plaintiffs may have standing based on the Court's own interpretation of SB 418. After consideration, the Court declines to consider that issue because neither complaint alleges that SB 418 should be read the way the Court suggested it should, and there are no allegations in either complaint related to standing under the Court's proposed interpretation.

B. Organizational Plaintiffs

The defendants next argue that the so-called organizational plaintiffs—603 and ODA—lack standing because "[t]hey are unable to" show that "some legal right of theirs is impaired or prejudiced." (Defs.' Mot. ¶¶ 39, 41 (cleaned up).) In making this argument, the defendants note that the organizational plaintiffs "do not register to vote," "do not register qualified voters to vote," have no constitutional rights at stake, and have "no legal right to be free of having to routinely manage resources to change or increase their volunteer or educational efforts." (Id. ¶ 42.) In response, the organizational plaintiffs assert that they have standing because "SB 418 requires them to divert resources to combat the burdensome effects of the new law." (603's Obj. at 14 (emphasis omitted).)

The organizational plaintiffs' argument is based on the so-called "diversion-of-resources" theory of standing. "Under the diversion-of-resources theory, an organization has standing to sue when a defendant's illegal acts impair the organization's ability to engage in its own projects by forcing the organization to divert resources in response." Arcia v. Fla. Sec'y of State, 772 F.3d 1335, 1341 (11th Cir. 2014). The "diversion-of-resources" theory of standing originated in Havens Realty Corp. v. Coleman, 455 U.S. 363 (1982). In that case, the plaintiff organization, Housing Opportunities Made Equal ("HOME"), alleged that Havens, a real estate company, steered black applicants, but not white applicants, away from its apartments, and that this practice violated the Federal Fair Housing Act. 455 U.S. at 368. HOME, a nonprofit organization whose purpose was "to make equal opportunity in housing a reality" in its geographic area, id., alleged that it was injured because Havens' racial steering

practices had frustrated its counseling and referral services and, consequently, served as a drain on its resources. On appeal, Havens argued that HOME lacked standing to sue. The United States Supreme Court disagreed, reasoning:

> If, as broadly alleged, [Havens'] steering practices have perceptibly impaired HOME's ability to provide counseling and referral services for low- and moderate-income homeseekers, there can be no question that the organization has suffered injury in fact. Such concrete and demonstrable injury to the organization's activities – with the consequent drain on the organization's resources – constitutes far more than simply a setback to the organization's abstract social interests[.]

Id. at 379. Consequently, the Court held that HOME had satisfied the "injury in fact" requirement of its Article III standing analysis.[5]

Upon reflection, the Court is not convinced that the diversion-of-resources theory of standing is sufficient to establish standing in this case. Here, the plaintiffs seek to

[5] In the years since Haven, some federal district and circuit courts have adopted the diversion-of-resources theory of standing in cases involving challenges to voting laws. See, e.g., Fla. State Conf. of NAACP v. Browning, 522 F.3d 1153, 1165–66 (11th Cir. 2008) (holding that NAACP had standing to challenge a new voting requirement because the NAACP "reasonably anticipate[d]" it would need to "divert personnel and time" from other projects "to educating . . . voters on compliance with" the requirement"); Crawford v. Marion Cnty. Election Bd., 472 F.3d 949, 951 (7th Cir. 2007), aff'd, 553 U.S. 181 (2008) (holding that political party had standing to challenge voter law that compelled "the party to devote resources to getting to the polls those of its supporters who would otherwise be discouraged by the new law from bothering to vote"); Black Voters Matter Fund v. Raffensperger, 508 F. Supp. 3d 1283, 1292 (N.D. Ga. 2020) ("The Court thus finds that Plaintiffs have established organizational standing under a diversion-of-resources theory."); Ga. State Conf. of NAACP v. DeKalb Cnty. Bd. of Registration & Elections, 484 F. Supp. 3d 1308, 1315 (N.D. Ga. 2020) ("According to Eleventh Circuit precedent, organizations can establish standing to challenge election laws by showing that they will have to divert personnel and time to educating potential voters on compliance with the laws and assisting voters who might be left off the registration rolls on Election Day."). Indeed, in a previous case, the undersigned found that a voting rights organization had standing to challenge a voting law based on diversion-of-resources allegations. See N.H. Democratic Party v. Gardner, No. 2017-CV-00432, 2018 WL 5929044, at *3 (N.H. Super. Apr. 10, 2018). Other state courts, however, have been more skeptical of the theory. See, e.g., Ariz. Sch. Bds. Ass'n, Inc. v. State, 501 P.3d 731, 736 (2022) (rejecting "proposition that an organization has standing to challenge the constitutionality of a statute if it demonstrates merely that the contested statute drained its resources and frustrated its mission"); Grassroots Collaborative v. City of Chicago, 186 N.E.3d 995, 1006 (Ill. App. Ct. 2020) ("The fact that plaintiffs reallocated their resources to counter the effects of the City's actions does not represent a palpable and distinct injury to plaintiffs, as the reallocation of resources is inherent in the operations of such organizations."); People for the Ethical Treatment of Animals, Inc. v. Bandera Wranglers, No. 04-21-00466-CV, 2023 WL 1810496, at *3 (Tex. App. Feb. 8, 2023) ("Although organizational standing has been recognized in federal courts for forty years, no Texas state court has recognized the concept of organizational standing" and noting that "one sister court has outright rejected its adoption outside the context of Fair Housing Act claims").

challenge the constitutionality of SB 418 by way of a declaratory judgment. See generally Grinnell v. State, 121 N.H. 823, 825 (1981) (noting that declaratory judgment statute "has long been construed to permit challenges to the constitutionality of actions by our government or its branches"); Avery, 162 N.H. at 607 (noting that declaratory judgment statute "provides a means to . . . question the validity of a law" (cleaned up)). Unlike standing in other contexts, "a party does not obtain standing [to bring a declaratory judgment action] merely by demonstrating that he has suffered an injury." Avery, 162 N.H. at 608. Rather, in order to have non-taxpayer standing "to question the validity of a law, or any part of it" in a declaratory judgment action, a party must "show[] that some right of his is impaired or prejudiced thereby." Id. (emphasis in original); see RSA 491:22. The Court does "not have the authority to circumvent this statutory requirement." Baer v. N.H. Dep't of Educ., 160 N.H. 727, 731 (2010).

Generally speaking, the "legal or equitable" rights sufficient to give rise to a declaratory judgment action are "substantive rights" belonging to the plaintiff, Emps. Liab. Assur. Corp. v. Tibbetts, 96 N.H. 296, 298 (1950), such as constitutional rights, property rights, and contractual rights. See, e.g., Benson v. N.H. Ins. Guar. Ass'n, 151 N.H. 590, 594 (2004) (holding that medical society lacked standing to bring declaratory judgment action regarding insurance coverage where it was not covered by policy, but holding that those covered by policy had sufficient contractual legal right to bring action); Faulkner v. City of Keene, 85 N.H. 147, 153 (1931) (holding that declaratory judgment action could be used to determine city ordinance's effect on plaintiffs' property rights). In this case, the organizational plaintiffs have failed to identify any similar type of right of theirs that is being impeded by the provisions of SB 418. While they allege

that SB 418 may lead to a drain on their resources in various ways, which may be sufficient to constitute an "injury" under the diversion-of-resources theory of standing for Article III purposes, they have not shown that they have a legal, equitable, or otherwise "protectable interest in their allocation of resources" as it existed prior to the enactment of SB 418. Grassroots Collaborative, 186 N.E.3d at 1006.[6] Indeed, as our supreme court has held, "an economic stake in [a] statute possibly being ruled unconstitutional" is not a "legal or equitable right" that is sufficient to confer standing to challenge the validity of a statute. Silver Bros. Co. v. Wallin, 122 N.H. 1138, 1140 (1982).

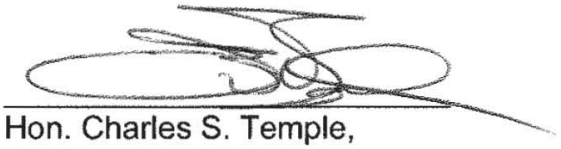
In sum, it seems abundantly clear to the Court that the "rights" at issue in this litigation are the constitutional rights of New Hampshire's voters, which the organizational plaintiffs maintain have been (or will be) violated by SB 418. However, under long-standing case law, the organizational plaintiffs may only challenge the constitutionality of SB 418 based on an invasion of their own rights. See Eby v. State, 166 N.H. 321, 334 (2014) ("The general rule in New Hampshire is that a party has standing to raise a constitutional issue only when the party's own rights have been or will be directly affected."); Hughes v. N.H. Div. of Aeronautics, 152 N.H. 30, 36 (2005) (holding that plaintiffs lacked standing to bring declaratory judgment action based on "the rights of the property owner, for the plaintiffs have no constitutionally protected rights in the property at issue"); State v. Roberts, 74 N.H. 476 (1908) ("A party will not be heard to question the validity of a law, or of any part of it, unless he shows that some right of his is impaired or prejudiced thereby."). For the reasons stated above, the plaintiffs have failed to identify the necessary "present legal or equitable right" belonging

[6] Notably, the plaintiffs cite no New Hampshire Supreme Court cases suggesting that a mere diversion-of-resources would be sufficient to establish standing to bring a declaratory judgment action, nor do they articulate why the theory is consonant with this State's declaratory judgment standing jurisprudence.

to them "to which the [defendants] [are] asserting an adverse claim." Delude v. Town of Amherst, 137 N.H. 361, 364 (1993). Absent that showing, the Court finds that the organizational plaintiffs lack standing to bring this declaratory judgment action. See also Carrigan, 174 N.H. at 366 (explaining that plaintiffs must "demonstrate[] a right to claim relief"). The defendants' motion to dismiss their claims is therefore GRANTED.[7]

So ordered.

Date: November 1, 2023



Hon. Charles S. Temple,
Presiding Justice

Clerk's Notice of Decision
Document Sent to Parties
on 11/03/2023

[7] In light of this finding, the Court need not address the defendants' ripeness argument.