

HILLSBOROUGH, SS
SOUTHERN DISTRICT

STATE OF NEW HAMPSHIRE

SUPERIOR COURT

Docket No. 226-2017-CV-00433

LEAGUE OF WOMEN VOTERS OF NEW HAMPSHIRE
DOUGLAS MARINO
GARRETT MUSCATEL, AND
ADRIANA LOPERA

v.

WILLIAM M. GARDNER,
IN HIS OFFICIAL CAPACITY AS THE NEW HAMPSHIRE SECRETARY OF STATE; AND
GORDON MACDONALD,
IN HIS OFFICIAL CAPACITY AS THE NEW HAMPSHIRE ATTORNEY GENERAL

and

Docket No. 226-2017-CV-00432

NEW HAMPSHIRE DEMOCRATIC PARTY,
BY RAYMOND BUCKLEY, CHAIR

v.

WILLIAM M. GARDNER,
IN HIS OFFICIAL CAPACITY AS THE NEW HAMPSHIRE SECRETARY OF STATE; AND
GORDON MACDONALD,
IN HIS OFFICIAL CAPACITY AS THE NEW HAMPSHIRE ATTORNEY GENERAL

STATE'S EMERGENCY MOTION TO DISMISS

The State of New Hampshire, William M. Gardner, in his official capacity as the New Hampshire Secretary of State, and Gordon MacDonald, in his official capacity as the New Hampshire Attorney General (“the State”), by and through counsel, the Office of the Attorney General, respectfully move on an emergency basis to dismiss these cases. In support of this Motion, the State says as follows:

1. These cases include two nearly identical nine-count complaints filed in this Court. Those complaints have been amended, on Friday, September 1 at 4:44 P.M. and 5:44 P.M., to reflect plaintiffs' abandonment of their federal claims in order to avoid federal jurisdiction. The Amended Complaints now consist of four counts: Count I: Violation of New Hampshire Constitution Part I, Article 11 (the Right to Vote); Count II: Violation of New Hampshire Constitution Part I, Article 11 (Contradicting the Domicile Qualification); Count III: Violation of Various Provisions of the New Hampshire Constitution (Equal Protection); Count IV: Violation of Various Provisions of the New Hampshire Constitution (Void for Vagueness).

2. The plaintiffs in both actions have failed to allege standing. In particular, the plaintiffs have failed to allege an "actual or imminent" injury.

3. The three individual plaintiffs in the League of Women Voters of New Hampshire case allege injuries that are, at best, conjectural or hypothetical and, therefore, are wholly insufficient to support standing.

4. The two institutional plaintiffs, the League of Women Voters and the New Hampshire Democratic Party ("NHDP"), cannot suffer a direct injury as SB 3 only regulates the voter registration process and neither of those plaintiffs are voters. The New Hampshire Supreme Court has rejected associational standing. However, even if that form of standing were recognized in this state, the plaintiffs have failed to allege adequately an injury.

5. Because the plaintiffs lack standing, this Court lacks jurisdiction. Therefore, it must grant the defendants' motion to dismiss.

WHEREFORE, the State respectfully requests that this honorable Court:

- A. Schedule an evidentiary hearing solely on the issue of standing;
- B. Grant this Motion to Dismiss; and

C. Grant such further relief as may be just and equitable.

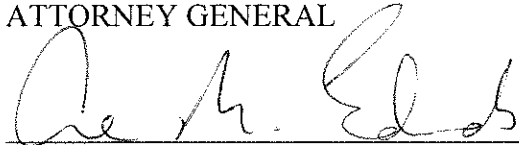
Respectfully submitted,

WILLIAM M. GARDNER,
SECRETARY OF STATE and

GORDON MACDONALD,
ATTORNEY GENERAL

By their attorneys,

GORDON J. MACDONALD
ATTORNEY GENERAL

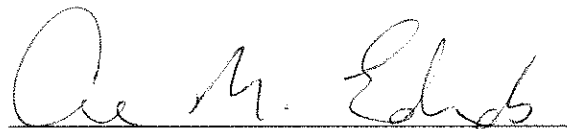


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September 5, 2017

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was transmitted by electronic mail to all counsel of record on September 5, 2017.



Anne M. Edwards
Associate Attorney General

HILLSBOROUGH, SS
SOUTHERN DISTRICT

STATE OF NEW HAMPSHIRE

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**MEMORANDUM OF LAW IN SUPPORT OF THE
STATE'S EMERGENCY MOTION TO DISMISS**

I. INTRODUCTION

Standing, a species of subject matter jurisdiction, is a fundamental requirement rooted in the limits of judicial power and the deference owed to the powers of the political branches. In a series of recent decisions, the New Hampshire Supreme Court has both underscored the

importance of this doctrine and given greater definition to its scope. In particular, the requirement that a plaintiff have an “actual or imminent” injury has been vigorously enforced. None of the plaintiffs in these cases meet this test.

Senate Bill 3 (“SB 3”) effected modest and incremental changes to New Hampshire’s voter registration process. These lawsuits allege that these changes violate the New Hampshire Constitution. The three individual plaintiffs allege injuries that are, at best, conjectural or hypothetical and, therefore, are wholly insufficient to support standing. The two institutional plaintiffs cannot suffer a direct injury as SB 3 only regulates the voter registration process and neither of those plaintiffs are voters. The New Hampshire Supreme Court has rejected associational standing. However, even if that form of standing were recognized in this state, the plaintiffs have failed to allege adequately an injury.

It goes without saying that, before a court can proceed, it must have subject matter jurisdiction which, of course, gives rise to its authority to act. In this case, because the plaintiffs lack standing, this Court lacks jurisdiction. Therefore, it must grant the State’s motion to dismiss.

II. RELEVANT BACKGROUND

Earlier this year, the Legislature enacted modest and incremental changes to the longstanding requirement that voters manifest their intent with respect to domicile under New Hampshire law. Governor Sununu signed SB 3 into law on July 10, 2017.

These lawsuits began as two nearly identical nine-count complaints filed in this Court. The defendants removed to the U.S. District Court. To avoid federal jurisdiction, the plaintiffs stripped out all of their federal claims and the federal court remanded on Sunday, September 3, 2017. The Amended Complaints now consist of four counts: Count I: Violation of New

Hampshire Constitution Part I, Article 11 (the Right to Vote); Count II: Violation of New Hampshire Constitution Part I, Article 11 (Contradicting the Domicile Qualification); Count III: Violation of Various Provisions of the New Hampshire Constitution (Equal Protection); Count IV: Violation of Various Provisions of the New Hampshire Constitution (Void for Vagueness).

III. ARGUMENT

A. Governing Legal Principles.

Standing is a question of subject matter jurisdiction. *Libertarian Party of New Hampshire v. Secretary of State*, 158 N.H. 194, 195 (2008). It is a doctrine that rests on the transcendent principle that the judicial power is limited. *Duncan v. State*, 166 N.H. 630, 642 (2014) (“the judicial power in this State is limited to deciding *actual* and not hypothetical cases”) (emphasis in original). Indeed, as the New Hampshire Supreme Court recently reiterated: “The doctrine of standing serves to prevent the judicial process from being used to usurp the powers of the political branches. In light of this overriding and time-honored concern about keeping the Judiciary’s power within its proper constitutional sphere, we must put aside the natural urge to proceed directly to the merits of an important dispute and to ‘settle’ it for the sake of convenience and efficiency.” *State of New Hampshire v. Actavis Pharma, Inc.*, 2016-0199, slip op. (N.H. Sup. Ct. June 30, 2017) (quotations and citations omitted).

In a series of cases over the last several years, the New Hampshire Supreme Court has given greater definition and force to the standing doctrine. Significantly, in *Duncan*, the Court observed that, “as a practical matter, Part II, Article 74 [of the New Hampshire Constitution] imposes standing requirements that are similar to those imposed by Article III of the Federal Constitution.” *Duncan*, 166 N.H. at 642 (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) (setting forth the elements of Article III standing)). Parties must have “personal

legal or equitable rights that are adverse to one another, with regard to an actual, not hypothetical dispute, which is capable of judicial redress.” *Id.*, at 642-43 (citations omitted); *cf. Lujan* 504 U.S. at 560 (Article III standing requires an injury in fact that is actual or imminent, not conjectural or hypothetical, the causal connection between the injury and the conduct complained of must be traceable to the defendant, and it must be likely that the injury will be redressed by a favorable decision). In *Actavis*, the Court concluded that the possibility of a settlement or judgment under the Consumer Protection Act was neither an “actual nor imminent” injury to support standing. *Actavis*, slip op., at p. 6 (citing *Lujan*).

B. Standard of Review.

The usual deference accorded to a plaintiff’s allegations on a motion to dismiss does not apply to a motion to dismiss challenging the lack of subject matter jurisdiction, including the lack of standing. The plaintiff must establish that standing exists and, when confronted with a motion to dismiss, “the trial court must look beyond the plaintiff’s unsubstantiated allegations and determine, based on the facts, whether the plaintiff has sufficiently demonstrated his right to claim relief.” *Sunapee Difference, LLC v. State*, 164 N.H. 778, 780 (2013). In light of this requirement, the State requests an evidentiary hearing solely on the issue of standing and a ruling on this motion to dismiss before the Court proceeds to consideration of the relief sought by the plaintiffs.

C. The Plaintiffs Lack Standing.

The plaintiffs cannot come close to meeting their burden. The “injuries” alleged by the individual plaintiffs are neither actual nor imminent. Indeed, they rest entirely on speculation and hypothetical events, which are insufficient to establish standing.

1. Mr. Marino Lacks Standing

Mr. Marino is, at present, actually registered to vote in Stratham. Complaint, at ¶ 10. The Complaint alleges that he “will likely move again within New Hampshire after he graduates from college in the Spring of 2018.” *Id.* (emphases added). The Complaint alleges that, “to the extent he has to re-register” at some hypothetical point in the future, it will be “difficult for him to obtain the documentation required by SB 3.” *Id.* (emphasis added). Why? Because he does not now “own a vehicle, nor does he know of receiving any government check, benefit statement, or tax document with his address on it.” *Id.* His name does not now appear on a utility bill, a deed, or a rental agreement. *Id.*

As the *Lujan* Court noted, an “imminent” injury cannot be stretched to the point where it rests entirely on speculation: “Although ‘imminence’ is concededly a somewhat elastic concept, it cannot be stretched beyond its purpose, which is to ensure that the alleged injury is not too speculative for Article III purposes – that the injury is certainly impending. It has been stretched beyond the breaking point when, as here, the plaintiff alleges only an injury at some indefinite future time, and the acts necessary to make the injury happen are at least partly within the plaintiff’s own control.” *Lujan*, 505 U.S. at 560 n.2 (first emphasis in original; second emphasis added). Mr. Marino’s injuries may, or may not, take place when he, may or may not, re-register to vote sometime after he graduates when he may not own a car, or have a government check, benefit statement, tax statement, utility bill, rental agreement or deed. This is plainly insufficient to establish standing.

2. Mr. Muscatel Lacks Standing

Mr. Muscatel’s “injuries,” if anything, rest on even a greater degree of speculation. He is about to begin his sophomore year as a student at Dartmouth College. Complaint, at ¶ 11. Mr. Muscatel is, at present, registered to vote in Hanover. *Id.* He will be moving out of his

“sophomore dormitory” at the end of his sophomore year (e.g., May 2018). *Id.* However, he intends to “remain domiciled in Hanover at least until he graduates from Dartmouth,” which would be no earlier than June 2020. *Id.* Therefore, it is inconceivable under what circumstances he would be re-registering to vote before 2020, as he intends to remain domiciled in Hanover. *See* RSA 654:1 (every inhabitant of the State shall have the right to vote in the “town, ward, or unincorporated place in which he or shall is domiciled”). Nonetheless, any such pointless and utterly hypothetical re-registration to occur at some unspecified time in the future would, he claims, be burdened by the fact that he does not now own a car, receive mail at his dormitory (as opposed to the campus mail center in Hanover), and “does not currently know how long the process would take for obtaining documentation from Dartmouth College to prove his domicile.” *Id.* Such conjecture and hypothesis do not come close to meeting the “actual or imminent” injury requirements.

3. Ms. Lopera Lacks Standing

Ms. Lopera’s claim of actual or imminent injury within the meaning of the standing doctrine is the most far-fetched. If and when she seeks to register to vote after moving to Nashua, she has a “lease on her apartment in Nashua” for a term of one year. *Id.* at ¶ 12. *See also* Exhibit EE ¶ 6 (noting that Ms. Lopera’s name is on the lease). That meets the modest requirements of SB 3. *See* RSA 654:2, II(d)(2) (evidence of renting or leasing an abode for a period of greater than 30 days is sufficient documentation under SB 3). To the extent that she claims injury arising from the requirement to register in person, that has long existed in New Hampshire law and has nothing to do with SB 3. And, to the extent she claims injury from a hypothetical requirement to re-register at some undetermined time in the future, *see* Complaint at ¶ 12, that is entirely speculative and insufficient constitute an actual and imminent injury.

In any event, even if Ms. Lopera – or any other voter seeking to register – does not have the required documentation, SB 3 expressly provides that she can still register and vote. *See* Amended RSA 654:7, III-IV (providing for registration by completing affidavits).

4. The League of Women Voters of New Hampshire Lacks Standing

The League of Women Voters of New Hampshire (“LWVNH”) cannot meet that threshold requirement because it faces no threat of injury. First, as an organization, it does not have the right to vote under Part I, Article 11 (Count I); because it does not have the right to vote, it is not subject to the domicile requirements under Part I, Article 11 (Count II); there is no allegation that SB 3 classifies and divides anyone other than New Hampshire voters impermissibly under equal protection requirements and there is no allegation that the LWVNH is subject to such classifications (Count III); and, only voters and not the LWVNH would be subject to any civil or criminal penalties under the allegedly void law (Count IV).

Second, the New Hampshire Supreme Court has long held that there is no associational standing in New Hampshire. *See Benson v. New Hampshire Ins. Guar. Ass’n*, 151 N.H. 590, 593 (2004) (the Medical Society’s status as the “representative organization for medical practitioners statewide” did not give it standing to seek a declaratory judgment that the respondent was obligated to provide tail coverage insurance; the Medical Society was not insured by NHIGA and had no rights to enforce against it). Even if it were recognized in New Hampshire, the LWVNH has not pled facts capable of supporting associational standing. The LWVNH does not identify a single member, much less one who will suffer an actual and imminent injury as a result of SB 3. *See Draper v. Healey*, 827 F.3d 1, 3 (1st Cir. 2016) (Souter, J.) (declining to find associational standing based on “an affidavit asserting that many of [an association’s] members asked it to take legal action[,]” explaining that “the association must, at the very least, identify a member

who has suffered the requisite harm.”) (internal quotations and brackets omitted). Indeed, each the LWVNH member is already a registered voter. Complaint, at ¶ 9.

5. The New Hampshire Democratic Party Lacks Standing

For the reasons set forth in the previous subsection, the New Hampshire Democratic Party also lacks standing. Although its Complaint does identify an individual member, Raymond Buckley, its chair, there are no allegations that he has or will suffer actual or imminent harm sufficient to support standing. Upon information and belief, he is a registered New Hampshire voter.

IV. CONCLUSION

For the foregoing reasons, the Court should, after an evidentiary hearing, grant the State’s motion to dismiss.

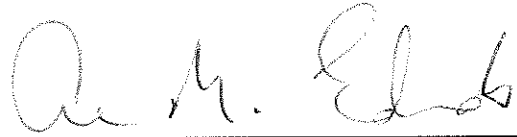
Respectfully submitted,

WILLIAM M. GARDNER,
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By their attorneys,

GORDON J. MACDONALD
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September 5, 2017

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was transmitted by electronic mail to all counsel of record on September 5, 2017.



Anne M. Edwards
Associate Attorney General