THE STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS SUPERIOR COURT
SOUTHERN DIVISION

603 FORWARD, ET AL.

v.

DAVID SCANLAN, ET AL.

Consolidated with

MANUEL ESPITIA, JR. ET AL.

v.

DAVID SCANLAN, ET AL.

No. 226-2022-CV-00233 and 226-2022-CV-00236

ESPITIA PLAINTIFFS' OBJECTION TO MOTION TO DISMISS FOR LACK OF STANDING AND RIPENESS

NOW COME Plaintiffs Manuel Espitia, Jr. and Daniel Weeks and respectfully object to the Defendants' Motion to Dismiss for Lack of Standing and Ripeness. In support of their Objection, Plaintiffs state as follows:

1. In this civil rights action, the Espitia Plaintiffs seek declaratory and injunctive relief because a recently passed statute, Senate Bill 418 ("SB 418"), violates Part I, Article 2-b of the New Hampshire Constitution by permitting the Secretary of State and his agents to learn for which candidates/issues a class of voters cast their ballots. In moving to dismiss, Defendants argue that the Espitia Plaintiffs' Complaint should be dismissed because they do not have standing to challenge SB 418, and because their claims are not ripe. Defendants are wrong.

2. The Espitia Plaintiffs have standing as taxpayers under RSA 491:22 and Part I, Article 8 of the New Hampshire Constitution to challenge the expenditure of public funds in

support of SB 418, which unconstitutionally deprives a category of voters of their privacy rights guaranteed by Part I, Article 2-b of the New Hampshire Constitution by removing the protections of the secret ballot. Additionally, the Espitia Plaintiffs' claims are ripe for judicial review. Despite Defendants' protestations that the complaint is "based on the possibility that the Secretary of State's Office will read and implement" SB 418 in a certain way, Defendants do not—because they cannot—explain how the law could be implemented in a way that does not use taxpayer fund and does not infringe upon Part I, Article 2-b. As a result, the Motion to Dismiss should be denied.

STANDARD

3. At the motion to dismiss stage, this Court should evaluate whether the Espitia Plaintiffs' "pleadings are reasonably susceptible of a construction that would permit recovery." *Plaisted v. LaBrie*, 165 N.H. 194, 195 (2013). The Court must "assume[s] that the [Espitia Plaintiffs'] pleadings are true and construe all reasonable inferences in the light most favorable to [them]." *Id*. While this Court "need not assume the truth of statements in the [Espitia Plaintiffs'] pleadings that are merely conclusions of law," *see Cluff-Landry v. Roman Catholic Bishop of Manchester*, 169 N.H. 670, 673 (2017), this Court must nonetheless accept as true the Espitia Plaintiffs' standing factual allegations where Defendants mount a jurisdictional challenge addressing the sufficiency of these standing factual allegations. *See Valentin v. Hosp. Bella Vista*, 254 F.3d 358, 363 (1st Cir. 2001) ("The first way is to mount a challenge which accepts the plaintiff's version of jurisdictionally-significant facts as true and addresses their sufficiency, thus requiring the court to assess whether the plaintiff has propounded an adequate basis for subject-matter jurisdiction."). However, to the extent Defendants challenge "the accuracy (rather than the sufficiency) of the jurisdictional facts asserted by the plaintiff[s]," this type of factual challenge "permits (indeed, demands) differential factfinding." *Id.* ("In conducting this inquiry, the court

enjoys broad authority to order discovery, consider extrinsic evidence, and hold evidentiary hearings in order to determine its own jurisdiction."). However, Defendants in this case have proffered *no* materials of evidentiary value—namely, affidavits or verified documents—to controvert the accuracy of the Espitia Plaintiffs' standing allegations. Accordingly, the Defendants' Motion to Dismiss can best be construed as a sufficiency challenge to the Espitia Plaintiffs' standing allegations where this Court must defer to the Espitia Plaintiffs' factual standing allegations.

I. ESPITIA AND WEEKS HAVE STANDING AS TAXPAYERS TO CHALLENGE SB 418

4. New Hampshire law permits taxpayers to challenge the unlawful appropriation or expenditure of funds. RSA 491:22, I provides in pertinent part:

> The taxpayers of a taxing district shall be deemed to have an equitable right and interest in the preservation of an orderly and lawful government within such district; therefore any taxpayer in the jurisdiction of the taxing district shall have standing to petition for relief under this section when it is alleged that the taxing district or agency or authority thereof has engaged, or proposes to engage, in any conduct that is unlawful or unauthorized, and in such a case the taxpayer shall not have to demonstrate that his or her personal rights were impaired or prejudiced.

The Defendants do not dispute that the State of New Hampshire is a taxing district, and that the Department of State and Department of Justice, through their Secretary and Attorney General, are agencies of the State.

5. Moreover, Part I, Article 8 of the New Hampshire Constitution provides:

> 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.

The Defendants do not dispute that the State of New Hampshire has "approved spending, public funds," and that the Department of State and Department of Justice, through their Secretary and Attorney General, are "political subdivisions" of the State.

6. Plaintiffs Manuel Espitia, Jr. and Daniel Weeks have alleged that they are taxpayers in the State of New Hampshire and are eligible to vote. *See* Complaint for Declaratory and Injunctive Relief, Case No. 226-2022-CV-00236 ("Espitia Compl.") ¶¶3-4. Their taxes go, in part, to the State of New Hampshire, including to fund the Secretary of State's Office and election administration. *Id.* As noted above, these facts must be deferred to at this pleadings stage of litigation.

7. On June 17, 2022, Governor Christopher Sununu signed Senate Bill 418 into law. *See* Espitia Compl. ¶ 11. It takes effect at the beginning of next year. *Id.* SB 418 creates an entirely new voting scheme for people who are registering to vote for the first time on election day and who do not have acceptable photo identification used to prove identity—one of the four qualifications to vote in New Hampshire (along with age, domicile, and citizenship). Espitia Compl. ¶ 15.

8. Under SB 418, a person who is registering for the first time in New Hampshire on election day without proof of identity will now be given an "affidavit ballot" when voting, as well as a packet explaining their new obligations. Espitia Compl, ¶ 20, *see generally* Espitia Compl. Exhibit 1, Senate Bill 418. As part of that packet, a voter is given a prepaid U.S. Postal Service Priority Mail Express envelope for overnight delivery addressed to the Secretary of State. *Id.* ¶ 21.

9. Voters who use an affidavit ballot will be required to return their proof of identity to the Secretary of State within 7 days of the election. *Id.* ¶ 27. Affidavit votes are counted on election day; however, if a voter does not return their proof of identity to the Secretary of State

within 7 days, the Secretary will instruct the moderator of the town, city, ward or district to retrieve the associated affidavit ballot and list, on a tally sheet, by candidate or issue, the votes case on that ballot. The votes cast by that voter will then be deducted from the voted total for each affected candidate or issue. *Id.* ¶ 28.

10. As a result, the Secretary and perhaps his staff will know how the voter cast their vote on each candidate or issue. This factual allegation too must be deferred to at this stage.

11. This governmental intrusion into the voter's private and personal data (i.e., how they voted) is unconstitutional under Part I, Article 2-b.

12. Importantly, SB 418 requires a substantial expenditure of public funds. As the Espitia Plaintiffs allege in their Complaint, at least hundreds of thousands of dollars will likely be required to implement SB 418. Espitia Compl. ¶ 26. Each overnight mailer will cost the Secretary of State more than twenty dollars, and the Secretary estimates that they would need at least 3,000 packets (including overnight mailers) for the primary and general elections. *Id.* ¶¶22-23.

13. Indeed, according to Defendant Scanlan's own estimation in the fiscal note appended to the bill, SB 418 will require the State to expend $48,000 in fiscal year 2023, and $72,000 in fiscal year 2025. *Id.* ¶24. New Hampshire is currently in fiscal year 2023. Moreover, the Secretary of State is required, under the bill, to provide "training for supervisors of the checklist on how the nonpublic data in the statewide centralized voter registration database may be used to satisfy voter identification requirements," and must "develop and make available an information pamphlet explaining the procedure established in RSA 260:21 for obtaining a picture identification card for voter identification purposes only." *See* Espitia Compl., Ex. 1; RSA 659:13, II (d)-(e) (2023 Supp.).

14. The New Hampshire Supreme Court historically had "two conflicting lines of cases regarding taxpayer standing to bring a declaratory judgment action." *Baer v. Dep't of Educ.*, 160 N.H. 727, 730 (2010). Under one line, taxpayers were permitted to maintain actions in equity against public officials for unlawful acts because "every taxpayer has a vital interest in and a right to the preservation of an orderly and lawful government regardless of whether his purse is immediately touched." *Id.* quoting *Green v. Shaw*, 114 N.H. 289, 292 (1974). Under a different line, taxpayers were required to demonstrate that their rights were directly impaired or prejudiced to maintain a declaratory judgment action. *See id.*

15. In 2010, the Supreme Court recognized this conflict in *Baer*, observed that the New Hampshire Constitution did not permit taxpayers to have standing to challenge governmental actions or expenditures without being directly impacted by the challenged activity, and overruled the line of cases which had permitted taxpayer standing.

16. In 2018, New Hampshire voters adopted an amendment to Part I, Article 8 of the New Hampshire Constitution which, as discussed above, makes clear that taxpayers challenging an official action need not demonstrate a specific or direct injury beyond their status as taxpayers. This amendment "was intended to return taxpayer standing in New Hampshire to its status prior to [the Court's] decisions in *Baer* and *Duncan* [*v. State*, 166 N.H. 360 (2014)]." *Carrigan v. N.H. Dep't of Health and Huan Servs.*, 174 N.H. 362, 368 (2021).

17. While the *Carrigan* decision establishes some limits on the contours of taxpayer standing, it does not prohibit the Espitia Plaintiffs' claim in this case. In *Carrigan*, the plaintiff challenged the Department of Health and Human Services' "poor allocation of resources, which relate to a series of spending the decisions the Department has made and continues to make" and its "unconstitutional budgetary decision-making in the face of uncontroverted evidence regarding

the connection between the absence of resources and the inability of New Hampshire to abide by its mandated legal obligations." *Id.* at 365 (cleaned up). The Court concluded that Part I, Article 8 did not permit a taxpayer to challenge "a governmental body's comprehensive response to a complex issue, such as child welfare, which encompasses many decisions to spend or approve spending, as well as decisions not to spend or approve spending." *Id.* at 370. That constitutional provision, the Court held, "does not provide the judiciary with the authority to . . . decide whether the State or a local government has 'invested sufficient resources to address' alleged shortcomings or has properly 'funded the agencies with responsibility for abiding by the legal requirements enacted by the legislature at levels that facilitate legal functioning.'" *Id.*

18. By contrast, here, the Espitia Plaintiffs are not generally challenging the Secretary of State and Attorney General's "comprehensive response to a complex issue," but are rather challenging a discrete enactment that necessitates specific expenditures and that will, according to Defendant Scanlan's own agency, require an outlay of tens of thousands of dollars per biennium to implement. *See* Espitia Compl. ¶ 24. These specific expenditures are not only plausibly alleged by the Espitia Plaintiffs and must be deferred to at this stage, but the Defendant Secretary of State's own statement confirms the specific appropriation of taxpayer funds during this very fiscal year. Espitia Compl, ¶ 24. And the Defendants have presented no actual evidence as part of an accuracy standing challenge that disputes the Espitia Plaintiffs' standing allegations. This should end the matter, requiring this case to proceed.

19. For these reasons, this action is more akin to previous taxpayer standing challenges which the New Hampshire Supreme Court has upheld. *See Carrigan*, 174 N.H. at 371 ("Our conclusion that Part I, Article 8 confers standing upon a plaintiff who challenges a particular governmental spending action is consistent with our pre-*Baer* decisions in which we determined

that taxpayers had standing…"); *see also Kurk v. Manchester*, 216-2019-CV-501 (Hills. Cty. Super. Ct. North August 12, 2019) (*Nadeau*, C.J.) attached as Exhibit 1, pp. 5-6 (finding plaintiffs had standing to challenge expenditure of $15,000 of taxpayer funds for cameras which they alleged would be used to violate RSA 236:130).

20. For example, in *Blood v. Electric Company*, 68 N.H. 340, 340-41 (1895), the Supreme Court upheld a taxpayers' suit to challenge the decision of a city counsel to enter into a streetlight operating contract (on the merits, the Court rejected the claim that Manchester could not enter into a ten year contract). In *Sherburne v. Portsmouth*, 72 N.H. 539, 540, 543-44 (1904), the Court allowed a taxpayer standing challenge to the City's decision to build a baseball park, and ruled that "the city councils may be enjoined from taking any action under this resolution toward building a baseball park . . . if that would be an unreasonable use of the premises." And in *N.H. Wholesale Beverage Ass'n v. N.H. State Liquor Comm'n*, 100 N.H. 5, 6-7 (1955), the Supreme Court ruled that taxpayers holding liquor permits had standing to challenge the Liquor Commission's policy regarding the issuance of liquor licenses.

II. ESIPITIA AND WEEKS' CLAIM IS RIPE

21. Defendants' ripeness argument fairs no better. "[R]ipeness relates to the degree to which the defined issues in a case are based on actual facts and are capable of being adjudicated on an adequately developed record." *Appeal of City of Concord*, 161 N.H. 344, 354 (2011). The doctrine "prevents courts from entangling themselves in abstract disagreements over administrative policies, and protects agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." *Appeal of State Emples. Assn'n*, 142 N.H. 874, 877 (1998).

22. Broadly, the purpose of the ripeness doctrine is to prevent cases from coming to court prematurely, when the challenged action is sufficiently tentative that it would not be a prudential use of judicial resources. *See, e.g.*, *Hill-Grant Living Trust v. Kearsarge Lighting Precinct*, 159 N.H. 529, 538 (2009) (regulatory taking claim not ripe because land use board has not reached a final decision regarding application of the regulations to the property at issue); *State v. Fischer*, 152 N.H. 205 (a state appeal from a denial of motion to suspend sentence with leave to later refile would not have been ripe because defendant's sentence had not yet been suspended). This is a very different circumstance—the Espitia Plaintiffs are challenging the constitutionality of an election law that has been finally enacted into statute and where, according to the Defendant Secretary of State, *the State will spend money during this very fiscal year to implement it*. Espitia Compl, ¶ 24.[1] In other words, though the law is effective January 1, 2023, plans must be now underway—and funds spent—so it can be fully implemented by the effective date, especially in anticipation of March 14, 2023 town elections. Moreover, despite suggesting that the Court should wait until the law is implemented on January 1, 2023, the Defendants do not even try to explain how the law could be implemented in a way that does not violate voters' privacy. Again, time is of the essence in election law challenges because there is always an upcoming election and best practices require courts entering injunctive relief to do so well before any election. Part I, Article 8 of the New Hampshire Constitution also contemplates justiciability merely for when the agency has "approved spending, public funds in violation of a law." It is not required that the money yet be spent.

[1] In none of the most recent challenges to election statutes decided by the New Hampshire Supreme Court has the court even considered a ripeness challenge. *See New Hampshire Democratic Party v. Secretary of State*, 174 N.H. 312 (2021); *Guare v. State* 167 N.H. 658 (2014); *Akins v. Secretary of State*, 154 NH. 67 (2006).

23. The New Hampshire Supreme Court has looked approvingly at a two-prong test for ripeness. Under the first prong, "a claim is fit for decision when: (1) the issues raised are primarily legal; (2) they do not require further factual development; and (3) the challenged action is final." *Univ. Sys. Of N.H. Bd. Of Trs. & a v. Dorfsman*, 168 N.H. 450, 455 (2015). "The second prong of the ripeness test requires that the contested action impose an impact on the parties sufficiently direct and immediate as to render the issue appropriate for judicial review at this state." *Id.* In addition, courts consider the "hardship to the parties if the court declines to consider the issue." *Id.*

24. The first prong in this case supports a finding of ripeness. The issues raised in this case are primarily legal: whether SB 418 violates the New Hampshire Constitution's privacy protections. Whether how a person votes is "personal" or "private" information within the meaning of Part I, Article 2-b are legal questions, as is what standard of review should be applied (Espitia Plaintiffs believe the law is subject to strict scrutiny). While it is true that some factual development will occur, likely focusing on the State's purported interests and whether SB 418 is narrowly tailored to a compelling governmental interest, the legal issues predominate. Defendants argue, incorrectly, that Plaintiffs' claims rely on unsubstantiated factual claims about the operation of SB 418, and that the alleged injuries "might only occur if the implementing agencies chose an interpretation of the law that manifests those harms." But Defendants notably do not say—because they cannot—how, exactly, they could implement SB 418 without violating voters' privacy rights. The statute says what it says, and the alleged harms to voters' privacy stems from the terms of the statute, which Defendants cannot alleviate through their implementation actions. And if the Defendants' dispute the Espitia Plaintiffs' factual allegations concerning the law's implementation—despite presenting no competing information of evidentiary value, including in

the form of affidavits—then discovery may be necessary in this case so this Court can reach a just result following the development of a full record. But, at this stage, the Espitia Plaintiffs' well-pled factual allegations must be deferred to.

25. In any event, this case does not require further factual development outside of the normal process. Disputed facts are common in litigation, which is why this Court has detailed rules providing for discovery, summary judgment, and trials. There is also no reason to believe that delay would aid this fact-finding process, especially as, if the Court determines intermediate- or strict-scrutiny is appropriate, the "government may not rely upon justifications that are hypothesized or invented *post hoc* in response to litigation." *Guare v. State*, 167 N.H. 658.

26. Finally, with respect to the first prong, the passage of SB 418 is a final action. As Espitia Plaintiffs allege in their complaint, the bill has passed each house of the General Court and has been signed by the Governor. This is the process by which bills in New Hampshire become law. *See* N.H. Const. Pt. II, Art. 44 ("Every bill which shall have passed both houses of the general court shall, before it becomes a law, be presented to the governor, if he approves, he shall sign it…"). The mere fact that the law has not yet taken effect yet does not mean that it is not a final action.[2]

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[2] Defendants suggest that "the realities of the pre-effective date and pre-implementation stage of SB 418 highlight the fact that the plaintiffs' claims are not ripe for adjudication." Motion to Dismiss, ¶51. But Defendants ignore that the reason SB 418 does not take effect until next year was to allow for court review before it became effective. As introduced, SB 418 took effect upon passage. http://www.gencourt.state.nh.us/bill_status/billinfo.aspx?id=2108&inflect=2. However, on April 13, 2022, the House Election Law Committee approved amendment 2022-1487h, which, among other things, changed the effective date to January 1, 2023. *Id.* The sponsor of amendment 2022-1487h, Representative Ross Berry, explained that the reason the effective date was pushed back was to give the judicial branch time to evaluate the law before it was implemented. https://www.youtube.com/watch?v=_Xd-jPtQCpM (beginning at 1:13:00) ("REP. BERRY: "I moved the enactment date to January first, 2023, we shouldn't be making major election law changes in a general election year it's just foolish. The second thing is I'm sure that there will be a lawsuit, not because there's I think there's anything legally wrong with this, but because anyone

27. As to the second prong, the Espitia Plaintiffs have alleged a sufficiently direct and immediate injury to render the issue appropriate for judicial review. Both Espitia Plaintiffs have alleged that, consistent with the statute and constitution, they will be injured by the Secretary of State's expenditure of public funds in implementing this unlawful act. RSA 491:22 explicitly contemplates challenges to future spending: "any taxpayer in the jurisdiction of the taxing district shall have standing to petition for relief under this section when it is alleged that the taxing district or agency or authority thereof has engaged, or *proposes to engage* in any conduct that is unlawful or unauthorized . . .". Further, the fiscal note appended to SB 418 explains that the Secretary of State expects to expend $48,000 in fiscal year 2023, which is occurring right now.[3]

28. Finally, the Court must consider the hardship to the parties if it declines to consider the dispute. *See Univ. Sys. Of N.H. Bd. Of Trs.,* 168 N.H. at 455. One such harm stems from the delay occasioned in deciding election law cases. *Purcell v. Gonzalez*, 549 U.S. 1, 4-6 (2006) established a principle that federal courts should not ordinarily enjoin a state's election 232

*22-23 (N.H. May 12, 2022) (discussing *Purcell* principle). While this doctrine has not been formally adopted by the New Hampshire Supreme Court in a published opinion,[4] the Department of Justice frequently raises it in cases. *See id*; *Petition of New Hampshire Secretary of State*, 2018-0208 (N.H. October 26, 2018) attached as Exhibit 2. Town elections are scheduled for March 14, 2023 (with alternate Town Elections scheduled for May 9, 2023).

can file a lawsuit and get an injunction going, *so this will give time for any lawsuit to work its way through before we're trying to implement it*.") (emphasis added).

[3] A fiscal year in New Hampshire begins July 1, ends June 30, and is named after the year in which it ends. https://www.nh.gov/transparentnh/how-government-finances-work/index.htm#:~:text=The%20state%20fiscal%20year%20runs,year%20in%20which%20it%20ends .

[4] The Espitia Plaintiffs explicitly reserve the right to argue that the *Purcell* principle does not apply under New Hampshire law and/or is inapplicable in this case.

https://www.sos.nh.gov/elections/elections/election-dates. There will also be City Elections in November 2023, and the next regularly scheduled state-administered election will likely be the Presidential Primary Election in the beginning of 2024. *See* RSA 653:9 ("The presidential primary election shall be held on the second Tuesday in March or on a date selected by the secretary of state which is 7 days or more immediately preceding the date on which any other state shall hold a similar election, whichever is earlier. . ."). No doubt the State will raise the *Purcell* principle if the Espitia Plaintiffs seek relief in advance of these elections. Thus, were this Court to decline to adjudicate this case on the basis of ripeness and require the Plaintiffs to wait until January (when the statute becomes effective) to raise their challenges, valuable months will be lost, and the likelihood of final relief (by this court or the New Hampshire Supreme Court) being issued close to an election rises.

III. CONCLUSION

29. In conclusion, the Espitia Plaintiffs have standing as taxpayers to assert this challenge, and their claim is ripe. The Court should deny the Motion to Dismiss for Lack of Standing and Ripeness.

Prayer for Relief

WHEREFORE, the Espitia Plaintiffs respectfully pray that this Honorable Court:

A. Deny the Defendants' Motion to Dismiss for Lack of Standing and Ripeness; and

B. Award such other relief as may be equitable.

Respectfully submitted,

MANUEL ESPITIA, JR. AND DANIEL WEEKS

By and through their attorneys affiliated with the American Civil Liberties Union of New Hampshire Foundation,

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September 26, 2022

Certificate of Service

I hereby certify that a copy of the foregoing was filed electronically through the court's e-filing system.

/s/ Henry Klementowicz
Henry Klementowicz

September 26, 2022

EXHBIT 1

STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS.
NORTHERN DISTRICT

SUPERIOR COURT

Neal Kurk, et al.

v.

City of Manchester

Docket No. 216-2019-CV-00501

ORDER

Petitioners have brought this action seeking declaratory and injunctive relief. The case arises out of the planned installation of surveillance cameras on Elm Street in Manchester. The City of Manchester has moved to dismiss, arguing the issue is not ripe for adjudication and that petitioners lack standing. Petitioners object. The Court held a preliminary injunction hearing on July 9, 2019. Upon consideration of the pleadings, arguments, and applicable law, the Court finds and rules as follows.

Factual Background

The Manchester Police Department, with the approval of the Mayor and Board of Alderman, currently plans to install three permanent surveillance cameras in the area of City Hall that will monitor Elm Street to the north and south. The cameras will transmit a live feed of their recordings to the Manchester Police Department's dispatch office. Recordings will be saved for two weeks.

In 2006, the New Hampshire Legislature passed RSA 236:130. That statute provides, in pertinent part:

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Hillsborough Superior Court Northern District
8/13/2019 9:41 AM

> I. In this subdivision, "surveillance" means the act of determining the ownership of a motor vehicle or the identity of a motor vehicle's occupants on the public ways of the state or its political subdivisions through the use of a camera . . . that by itself or in conjunction with other devices or information can be used to determine the ownership of a motor vehicle or the identity of a motor vehicle's occupants.
>
> II. Neither the state of New Hampshire nor its political subdivisions shall engage in surveillance on any public ways of the state or its political subdivisions.
>
> . . . .
>
> V. Any person violating the provisions of this section shall be guilty of a violation if a natural person, or guilty of a misdemeanor if any other person.

Petitioners have brought this action seeking to prevent the installation of the cameras, arguing their use will violate the provisions of RSA 236:130.

Analysis

The City first argues that this matter is not ripe for consideration as the cameras have not been installed and thus no violation of the statute has occurred. The Court disagrees. "The distinguishing characteristic of [a declaratory judgment action] is that it can be brought before an actual invasion of rights has occurred. It is intended to permit a determination of a controversy before obligations are repudiated and rights invaded." Portsmouth Hosp. v. Indemnity Ins. Co. of North America, 109 N.H. 53, 55 (1968). "The remedy of declaratory judgment affords relief from uncertainty and insecurity created by a doubt as to rights, status or legal relations existing between the parties." Benson v. New Hampshire Ins. Guar. Ass'n, 151 N.H. 590, 594 (2004). Therefore, the Court finds that petitioners may properly pursue relief prior to the actual violation of the statute in question.

"However, the ability to obtain a declaratory judgment before an invasion of rights has occurred does not obviate the standing requirement that the controversy involve adverse interests that are not based upon hypothetical facts." Carlson v. Latvian Lutheran Exile Church of Boston and Vicinity Patrons, Inc., 170 N.H. 299, 303 (2017). The City argues none of the petitioners have standing to bring this action. Petitioners object, arguing both taxpayer standing and traditional common law standing.

"[S]tanding under the New Hampshire Constitution requires parties to 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." Duncan v. State, 166 N.H. 630, 642–43 (2014) (citations omitted). "Neither an abstract interest in ensuring that the State Constitution is observed nor an injury indistinguishable from a generalized wrong allegedly suffered by the public at large is sufficient to constitute a personal, concrete interest." State v. Actavis Pharma, Inc., 170 N.H. 211, 215 (2017). "Rather, the party must show that its own rights have been or will be directly affected." Id.

As to common law standing, the Court finds petitioners' argument is largely based on a misreading of RSA 236:130. When construing a statute's meaning, the Court first examines its language, ascribing "the plain and ordinary meanings to words used." Garand v. Town of Exeter, 159 N.H. 136, 141 (2009). The Court does not look beyond the words to determine legislative intent if the language of the statute is clear and unambiguous, and will construe all parts of a statute together to avoid an unjust or absurd result. Id. (citing Formula Dev. Corp. v. Town of Chester, 156 N.H. 177, 178–79 (2007)). "The legislature is not presumed to waste words or enact redundant provisions

and whenever possible, every word of a statute should be given effect." Town of Amherst v. Gilroy, 157 N.H. 275, 279 (2008). The Court also "presume[s] that the legislature does not enact unnecessary and duplicative provisions." State v. Gifford, 148 N.H. 215, 217 (2002). Finally, the Court "interpret[s] statutes in the context of the overall statutory scheme and not in isolation." State v. Balliro, 158 N.H. 1, 4 (2008).

Petitioners argue that RSA 236:130 prohibits the installation of cameras that "can be used" to determine the identity of a motor vehicle's occupants. However, the Court finds their reliance on that particular language is misguided. The "can be used" phrase modifies the word "camera,"[1] and serves to define the mechanisms by which surveillance in violation of the statute can be achieved. The statute explicitly defines "surveillance" as "the *act of determining* the ownership of a motor vehicle or the identity of a motor vehicle's occupants." RSA 236:170, I (emphasis added). It is therefore not enough that the City install a camera that "can be used" to identify the occupant of a vehicle; someone must actually review the recording and make the identification.

That being said, the Court agrees with petitioners that the simple act of a government employee recognizing a vehicle or its occupants, without taking additional steps such as running a license plate through dispatch, constitutes a violation of the statute as written. The Court further agrees that it is virtually inevitable that in reviewing the footage generated by the cameras, a government actor[2] will, given enough time, recognize someone in a car on Elm Street, even if by accident. In doing so, that

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[1] Though omitted as irrelevant for purposes of this order, the statute also applies to "other imaging device[s] or any other device, including but not limited to a transponder, cellular telephone, global positioning satellite, or radio frequency identification device." RSA 236:170, I.

[2] It has been represented that the stored footage will be subject to right-to-know requests under RSA 91-A, and therefore may also be reviewed by members of the public. However, the statute only prohibits the state and its political subdivisions from engaging in surveillance.

individual will have "determin[ed] the . . . identity of a motor vehicle's occupants on the public ways of the state or its political subdivisions." RSA 236:130, I. Nevertheless, the Court finds that petitioners lack common law standing in this case.

Petitioners' argue they have standing because they "are likely to have their identifying information concerning their vehicle captured by the Elm Street surveillance cameras planned by the City." (Pls.' Obj. Mot. Dismiss at 6.) However, as set forth above, the mere capture of identifying information is not made illegal by the statute. Instead, petitioners must articulate that they will personally be identified by a City employee reviewing the footage.

Petitioners argue that the use of the cameras will "inevitably and inherently cause officers reviewing the live feed to immediately identify some motorists where the officer is familiar with the motorist, a reality that is not uncommon in a mid-sized City." (Compl. at 10.) As articulated, this is exactly the type of "generalized wrong allegedly suffered by the public at large" that does not confer standing. See Actavis Pharma, Inc., 170 N.H. at 215. Even assuming the truth of their argument, the petitioners have failed to articulate any basis to believe that they personally will be identified. Therefore, the Court finds that petitioners' allegations are simply too speculative and generalized to confer standing.

However, the Court finds that petitioners Carla Gericke and John Slattery, as property owners in Manchester, have taxpayer standing. New Hampshire recently amended its constitution to include the following language:

> [A]ny 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. Part I, Article 8. Petitioners have alleged that the City has or will spend approximately $15,000 of taxpayer funds to purchase and install the cameras in question, which will result in the potential violation of RSA 236:130. The Court finds this is sufficient to confer standing on these two petitioners. That being said, the Court finds the petitioners have failed to establish the right to preliminary injunctive relief.

"The issuance of injunctions, either temporary or permanent, has long been considered an extraordinary remedy." Murphy v. McQuade, 122 N.H. 314, 316 (1982). "A preliminary injunction is a provisional remedy that preserves the status quo pending a final determination of the case on the merits." DuPont v. Nashua Police Dep't, 167 N.H. 429, 434 (2015). In order to obtain preliminary injunctive relief, the moving party must generally demonstrate: (1) a likelihood of success on the merits; (2) that "there is an immediate danger of irreparable harm to the party seeking injunctive relief"; and (3) that "there is no adequate remedy at law." N.H. Dep't of Envtl. Servs. v. Mottolo, 155 N.H. 57, 63 (2007). "[T]he granting of an injunction is a matter within the sound discretion of the court exercised upon a consideration of all the circumstances of each case and controlled by established principles of equity." Dupont, 167 N.H. at 434.

With respect to irreparable harm, petitioners argue that, absent preliminary relief, their identifying information will be captured by the City's cameras. (Petr's.' Obj. Mot. Dismiss at 6.) As noted earlier, this is not a violation of the statute. However, even interpreting petitioners' claim as including the identification of motorists as prohibited by the statute, equitable relief is unavailable as the harm petitioners identify is simply a

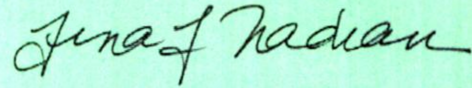
violation of a criminal statute. It was long ago held by the New Hampshire Supreme Court that "[t]he equity powers of the court are not often, if ever, invoked or used to restrain or suppress the commission of crimes and misdemeanors, either as a substitute for the remedy by prosecution for the penalty affixed to the offense, or to obviate the necessity of repeated prosecutions." City of Manchester v. Smyth, 64 N.H. 380, 380 (1887). "The court will not interfere by injunction . . . to prevent the violation of a criminal statute when the violation does not constitute a public nuisance." New Hampshire Bd. of Registration in Optometry v. Scott Jewelry Co., 90 N.H. 368, 371 (1939). Other jurisdictions are in accord. See United States v. Zenon, 711 F.2d 476, 479 (1st Cir. 1983) ("Though a court of equity should be reluctant to enjoin the commission of a crime . . . , nonetheless injunctive relief is appropriate where the prosecution of the criminal charge is not an adequate remedy, as when the conduct is creating a widespread public nuisance or a national emergency."); Whitaker v. Prince George's County, 514 A.2d 4, 9 (Md. 1986) (finding courts will not "enjoin the further continuance or prevention of threatened illegal acts" merely because they are criminal, but where "the acts complained against constitute a nuisance or a danger to the public health and public welfare and a more complete remedy is afforded by injunction than by criminal prosecution, a court of equity may . . . grant the relief sought by the injunction"); State v. H. Samuels Co., Inc., 211 N.W.2d 417, 419–20 (Wis. 1973) (finding "a court of equity will not enjoin a crime because it is a crime," but where criminal acts also cause damage, equity will grant relief "not because the acts are in violation of the statute, but because they constitute in fact a nuisance").

Petitioners have not articulated any harm that would arise from a violation of the statute aside from the fact that a crime will have occurred. Petitioners have not made any allegation of public nuisance, and the facts of this case do not support any such argument. Petitioners' general claims of privacy are unconvincing; the information that will be captured by the cameras—the faces of individuals driving on a public way in Manchester and the license plate numbers of their vehicles—is public and in plain view of every other individual traveling on the same road.

Furthermore, the statute, as drafted by the legislature, provides for a set penalty. Violation of the law constitutes a violation-level offense if committed by a natural person, and a misdemeanor if committed by any other person. RSA 236:130, V. It is therefore apparent that the legislature deemed these criminal penalties to be an adequate remedy. Had the legislature contemplated private equity actions to combat violations of the statute, it could have expressly provided for such relief, as it has in other statutes. See, e.g., RSA 664:14-a, IV(b) ("Any person injured by another's violation of this section may bring an action for damages and for such equitable relief, including an injunction, as the court deems necessary and proper.").

For the foregoing reasons, the Court finds petitioners have failed to establish a danger of irreparable harm and the lack of an adequate remedy at law. Accordingly, petitioners' motion for preliminary injunctive relief is DENIED. Moreover, respondent's motion to dismiss is GRANTED as to petitioners Neal Kurk and Holly Seal.

SO ORDERED.



August 12, 2019

Tina L. Nadeau
Presiding Justice

Clerk's Notice of Decision
Document Sent to Parties
on 08/13/2019

EXHBIT 2

THE STATE OF NEW HAMPSHIRE

SUPREME COURT

In Case No. 2018-0208, Petition of New Hampshire Secretary of State & a., the court on October 26, 2018, issued the following order:

Upon consideration of the Emergency Motion to Stay filed by the defendants, 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 the objection filed by the plaintiffs, the League of Women Voters of New Hampshire, Douglas Marino, Garrett Muscatel, Adriana Lopera, Phillip Dragone, Spencer Anderson, Seysha Mehta, and the New Hampshire Democratic Party, the court hereby grants the motion.

In granting this stay, the court expresses no opinion on the merits of the plaintiffs' underlying challenge to Laws 2017, Chapter 205 (also known as "SB 3"). However, the court is persuaded that, regardless of the merits, the timing of the preliminary injunction, entered by the trial court a mere two weeks before the November 6 election, creates both a substantial risk of confusion and disruption of the orderly conduct of the election, and the prospect that similarly situated voters may be subjected to differing voter registration and voting procedures in the same election cycle. For example, under the trial court's orders, the provisions of SB 3, which have been in effect since September 2017 and which the plaintiffs assert are confusing and intimidating, will remain in effect until election day. Yet persons who seek to register on election day will not be subjected to these same procedures. "These inconsistencies will impair the public interest." Veasey v. Perry, 769 F.3d 890, 896 (5th Cir.), motion to vacate stay denied, 135 S. Ct. 9 (2014).

We are not alone in declining to interfere with a fast-approaching election. See id. at 892 (granting emergency motion to stay trial court order enjoining voter photo identification law on ground that it was unconstitutional); Colón-Marrero v. Conty-Pérez, 703 F.3d 134, 139 (1st Cir. 2012) (declining to issue a preliminary injunction requiring the plaintiff and 300,000 other voters to be reinstated, even though the plaintiff had demonstrated likelihood of success on the merits, because doing so, "on the eve of a major election" would "disrupt long-standing election procedures"). Indeed, in Williams v. Rhodes, 393 U.S. 23, 34-35 (1968), "[t]he Supreme Court . . . declined to interfere . . . , even after finding that . . . ballots unconstitutionally excluded certain candidates." Veasey, 769 F.3d at 893. More recently, the Court has "stayed injunctions issued based on findings that changes in an election law were discriminatory." Id. at 896 (Costa, J., concurring in the judgment) (citing

cases). "[T]he Supreme Court's recent decisions in this area" evidence that "its concern about confusion resulting from court changes to election laws close in time to the election should carry the day in the stay analysis." Id. at 897.

As the Court has cautioned, "Court orders affecting elections, especially conflicting orders, can themselves result in voter confusion and consequent incentive to remain away from the polls." Purcell v. Gonzalez, 549 U.S. 1, 4-5 (2006). In the apportionment context, the Supreme Court has instructed that, "[i]n awarding or withholding immediate relief, a court is entitled to and should consider the proximity of a forthcoming election and the mechanics and complexities of state election laws, and should act and rely upon general equitable principles." Reynolds v. Sims, 377 U.S. 533, 585 (1964). Accordingly, "under certain circumstances, such as where an impending election is imminent and a State's election machinery is already in progress, equitable considerations might justify a court in withholding the granting of immediately effective relief in a legislative apportionment case, even though the existing apportionment scheme was found invalid." Id.; cf. Benisek v. Lamone, 138 S. Ct. 1942, 1944 (2018) (deciding that, even if the plaintiffs were likely to succeed on their claim that Maryland's congressional redistricting map was an unconstitutional political gerrymander, "the balance of equities and the public interest tilt[ ] against their request for a preliminary injunction").

For all of the above reasons, therefore, we grant the defendants' emergency motion for a stay. The orders of the Superior Court (Brown, J.) dated October 22, 2018, and October 25, 2018, granting a preliminary injunction in favor of the plaintiffs are hereby stayed and shall not take effect until after the conclusion of the election on November 6, 2018. Until this stay expires, the temporary restraining order entered by the Trial Court (Temple, J.) on September 12, 2017, enjoining the enforcement of the civil and criminal penalty provisions of SB 3, remains in full force and effect.

Lynn, C.J., and Hicks, Bassett, Hantz Marconi, and Donovan, JJ., concurred.

Eileen Fox,
Clerk

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