

THE STATE OF NEW HAMPSHIRE

STRAFFORD, SS.

SUPERIOR COURT

No. 219-2012-cv-458

Annemarie Guare, et al.

v.

The State of New Hampshire,
William Gardner, Secretary of State

O R D E R

The plaintiffs, Annemarie E. Guare, Garret Healy, Cody Blesedell, Joan Ashwell, and the League of Women Voters request a declaratory ruling that a section of the voter registration form prescribed by RSA 654:7, V (Supp. 2013) violates the New Hampshire and Federal Constitutions. The plaintiffs and the defendant State of New Hampshire through its Secretary of State, William Gardner, filed cross-motions for summary judgment. The court held a hearing on the motions on May 20, 2014.

Background

In 2012, the General Court passed Senate Bill 318, which in part, changed the wording of the standard voter registration form used throughout New Hampshire. As relevant to this case, the law added the following sentence:

In declaring New Hampshire as my domicile, I am subject to the laws of the state of New Hampshire which apply to all residents, including laws requiring a driver to

register a motor vehicle and apply for a New Hampshire's driver's license within 60 days of becoming a resident.

See RSA 654:7, V (Supp. 2013) ("the subject language").

On September 11, 2012, the plaintiffs filed this action, claiming the subject language conflates domicile and residency, and thereby misstates the law in violation of a citizen's constitutional right to vote. Following several hearings, the superior court granted the plaintiffs' request for a preliminary injunction. See Order, Sept. 24, 2012 (Lewis, J.) (document no. 14). That order, among other things, removed the subject language from the voter registration form pending final resolution of this case. The court subsequently amended the order to remove a requirement that the State post certain information on its website. See Order, Oct. 5, 2012 (Lewis, J.) (document no. 37). The order as amended did not change the court's ruling that the subject language be removed from the form.

Standard of Review

In order to grant summary judgment, the record must "show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." See RSA 491:8-a, III (2010). A fact is "material . . . if it affects the outcome of the litigation under the applicable substantive law." Palmer v. Nan King Rest., 147 N.H. 681, 683 (2002). When both parties seek summary judgment, the court reviews the motions

separately and takes the facts and inferences in the light most favorable to the non-moving party. City of Concord v. State, 164 N.H. 130, 133 (2012).

Analysis

Part I, Article 11 of the New Hampshire Constitution states in relevant part, "[a]ll elections are to be free, and every inhabitant of the state of 18 years of age and upwards shall have an equal right to vote in any election." N.H. CONST. pt. I. art. 11. Given that this case involves a constitutional challenge to lawfully enacted legislation, the court must first decide which test of constitutionality applies to the statute. Once the standard is established, the court applies that test and determines whether the statute withstands the appropriate level of judicial scrutiny.

I. Level of Scrutiny

The plaintiffs argue that the court should apply strict scrutiny to the subject language of RSA 654:7, V, because it imposes a severe restriction on a citizen's right to vote. Pl.'s Memo. of Law in Supp. of Mot. Summ. J. at 11 (citing Akins v. Secretary of State, 154 N.H. 67, 72 (2006)). At the hearing on the motions, the State argued the court should apply a rational basis test because everyone must complete the same form to register to vote and therefore the law is non-discriminatory.

In Akins, the plaintiffs challenged the manner in which candidates running for office were listed on the ballot. Id. at 68. Specifically, the statute stated that candidates would be organized by political party, with the party that received the highest number of combined votes for all offices in the last election listed first. Id. Within a given political party, the individual candidates would be listed alphabetically. Id.

In deciding that the right to be elected into office under Part I, Article 11 was a fundamental right, the Court reaffirmed "the right to vote is fundamental" Id. at 71 (citing McGraw v. Exeter Region Coop. Sch. Dist., 145 N.H. 709, 713 (2001)). The designation of a right as fundamental is important because "generally, when governmental action impinges upon a fundamental right, such matters are entitled to review under strict scrutiny." Id. (citing Claremont Sch. Dist. v. Governor, 142 N.H. 462, 472 (1997)).

However, simply because a right "under Part I, Article 11 is fundamental does not mean that any impingement upon that right triggers strict scrutiny." Id. Citing federal case law, the Court found that "when the election law at issue subjects the plaintiff's rights to 'severe' restrictions, the regulation must withstand strict scrutiny to be constitutional." Id. at 72 (citing Burdick v. Takushi, 504 U.S. 428, 433-34 (1992)). Conversely, "[w]hen the election law imposes only 'reasonable, nondiscriminatory restrictions' upon the plaintiff's rights, then 'the State's

important regulatory interests are generally sufficient to justify the restrictions.'" Id. (quoting Burdick, 504 U.S. at 434).

After applying the framework above, the Court concluded:

The ordering of parties on a ballot based upon votes in the prior election and the alphabetization of candidates are not "reasonable, nondiscriminatory restrictions," because these restrictions discriminate against candidates running in minority parties and against candidates whose surnames do not begin with letters located near the beginning of the alphabet.

Id. at 73. The Court's holding was based in part on the Secretary of State's testimony regarding the advantages the primacy effect can give to candidates listed earlier in sequence on the ballot.

Id. at 72-73. Accordingly, the Court found that the practice by which the Secretary of State listed candidates on the ballot must survive strict scrutiny. Id. at 73.

In this case, the parties agree that a citizen need not be a resident of New Hampshire in order to vote in this state. RSA 21:6 states:

A resident or inhabitant or both of this state and of any city, town or other political subdivision of this state shall be a person who is domiciled or has a place of abode or both in this state and in any city, town or other political subdivision of this state, and who has, through all of his actions, demonstrated a current intent to designate that place of abode as his principal place of physical presence for the indefinite future to the exclusion of all others.

RSA 21:6 (2012). Rather, both parties agree that being a domiciliary of New Hampshire entitles a citizen to vote here.

Specifically, RSA 651:1 states:

Every inhabitant of the state, having a single established domicile for voting purposes, being a citizen of the United States, of the age provided for in Article 11 of Part First of the Constitution of New Hampshire, shall have a right at any meeting or election, to vote in the town, ward, or unincorporated place in which he or she is domiciled. An inhabitant's domicile for voting purposes is that one place where a person, more than any other place, has established a physical presence and manifests an intent to maintain a single continuous presence for domestic, social, and civil purposes relevant to participating in democratic self-government. A person has the right to change domicile at any time, however a mere intention to change domicile in the future does not, of itself, terminate an established domicile before the person actually moves.

RSA 651:1, I (Supp. 2013).

Simply put, a citizen must be a domiciliary but not necessarily a resident of New Hampshire in order to vote here. The basic difference between the two is that a resident has manifested an intent to remain in New Hampshire for the indefinite future, while a domiciliary does not necessarily intend to remain in New Hampshire indefinitely. When a person becomes a resident of New Hampshire, the person must, among other things, obtain a New Hampshire driver's license and vehicle registration. See RSA 261:45; RSA 263:35 (2004). These requirements do not apply to those solely domiciled in New Hampshire.

The distinction between resident and domicile is most easily illustrated by three of the plaintiffs in this case who are currently enrolled in the University of New Hampshire. See Pl.'s Memo. of Law in Supp. of Mot. Summ. J. at 3-6; and Exhibits B, C, and D. All have out-of-state driver's licenses, but spend more

time in New Hampshire than any other state by virtue of their school attendance. None plan to remain in New Hampshire after graduation, but while here, they wish to vote in New Hampshire elections. Therefore, these plaintiffs are domiciled in New Hampshire, but are not residents of New Hampshire. The parties agree these plaintiffs are entitled to vote in New Hampshire elections.

The parties also agree that the subject language does not change the definition of domicile for purposes of voting contained in RSA 651:1, I. In this way, the subject language in the voter registration form statute is not substantive, but is rather informational as it only informs the voter of substantive laws contained in other statutes. Compare RSA 654:7, V; RSA 21:6; and RSA 651:1, I. Still, misleading, confusing, or untrue statements of the law on the registration form may have a significant impact on whether a domiciliary decides to register to vote in the first instance. If, by reading the information on the form a domiciliary chooses not to register to vote, the form has directly caused a citizen to forgo a fundamental right. The threat to the fundamental right to vote here is at least as acute as the danger that alphabetical listing of candidates had on the right to be elected in Akins. Therefore, the court finds the subject language must survive strict scrutiny.

II. Strict Scrutiny

Under "the state strict scrutiny test, a statute's infringement upon a fundamental right will pass constitutional muster if it is 'necessary to achieve a compelling State interest,' and is 'neither unduly restrictive nor unreasonable.'" In re Christopher K., 155 N.H. 219, 226 (2007) (quoting Seabrook Police Assoc. v. Town of Seabrook, 138 N.H. 177, 179 (1993)); see also Akins, 154 N.H. at 73. The New Hampshire Supreme Court has "noted that the latter prong of our state test is similar to the federal narrowly tailored requirement." In re Christopher K., 155 N.H. at 225 (quotation and quotation marks omitted).

The State advances several interests that justify the subject language including: 1) an interest in ensuring payment of all applicable fees and taxes; 2) an interest in helping New Hampshire comply with the Help America Vote Act of 2002 ("HAVA"); and 3) an interest in avoiding confusion among voters with an out-of-state driver's license.

The parties disagree on whether the subject language in the voter registration form conflates the definitions of residency and domicile. To the extent this case turns on statutory interpretation, it is a matter of law for the courts to determine. See, e.g., State v. Mercier, 165 N.H. 83, 85 (2012). The plaintiffs point to the language stating that when registrants declare New Hampshire their domicile they are "subject to the laws

of the state of New Hampshire which apply to all residents." They argue that is an untrue and confusing statement of the law, because a domiciliary is not required to obtain a New Hampshire driver's license and vehicle registration. The State maintains that in order for the court to find the subject language unconstitutional, it must ignore the last four words "of becoming a resident." The State asserts the subject language is a plainly worded and true statement of the law requiring a domicile to obtain a New Hampshire driver's license and register his or her vehicle in this state within 60 days of becoming a resident.

A critical component missing from the subject language is any explanation that domicile and residency are not the same. The language is susceptible of being read quite reasonably to mean that by registering to vote, the person must obtain a New Hampshire driver's license and vehicle registration. That reasonable implication of the subject language is a misstatement of the law. Most voters are not legal technicians and should not need to be in order to understand the registration form. The court finds that the statute is a confusing and unreasonable description of the law.

Based on the court's interpretation, the subject language is unduly restrictive and/or unreasonable as applied to the State's three purported interests. First, the subject language is not necessary to ensure the payment of required fees and taxes. In fact, if the subject language has the effect of making voting

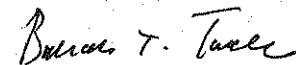
domiciliaries believe they must register their motor vehicles, the subject language may actually cause the collection of more fees than the State would otherwise be entitled to receive. Next, the subject language as set out is not required by HAVA, and the State cannot claim that its inclusion is necessary to advance the State's compliance with HAVA. Lastly, based on the court's interpretation, the subject language adds to rather than detracts from the confusion regarding voters with out-of-state driver's licenses. Thus, the continued use of the subject language is not reasonably necessary to advance any interest the State has set forth.

Conclusion

For the reasons given, the court finds as a matter of law that the subject language of RSA 654:7, V violates Part I, Article 11 of the New Hampshire Constitution. Therefore, the plaintiffs' motion for summary judgment (document no. 60) is granted. The State's motion for summary judgment (document no. 68) is denied. The court makes permanent the preliminary injunction issued by the court on September 24, 2012, as modified by the court on October 5, 2012.

SO ORDERED.

July 24, 2014



Brian T. Tucker
Presiding Justice