THE STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS.
NORTHERN DISTRICT

SUPERIOR COURT

New Hampshire Democratic Party,
by Raymond Buckley, Chair
v. **Docket #226-2017-CV-432**

William M. Gardner, in his official capacity as the New Hampshire Secretary of State
Gordon MacDonald, in his official capacity as the New Hampshire Attorney General

and

League of Women Voters of New Hampshire, Douglas Marino, Garrett Muscatel, Adriana Lopera, Phillip Dragone, Spencer Anderson, and Seysha Mehta

v. **Docket #226-2017-CV-433**

William M. Gardner, in his official capacity as the New Hampshire Secretary of State
Gordon MacDonald, in his official capacity as the New Hampshire Attorney General

DEFENDANTS' MOTION FOR AN EXPEDITED EVIDENTIARY HEARING ON PLAINTIFFS' STANDING

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, hereby respectfully move that this court schedule an expedited evidentiary hearing on whether the plaintiffs have standing.

I. Introduction

This is a case in which the plaintiffs have asked the court for the extraordinary remedy of invalidating an act of the legislature that became law with the governor's signature. While it is unquestionably in the judiciary's power to strike down a statute if it is incompatible with the state constitution, it is a power that must be exercised sparingly and cautiously. This is

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principally because of the serious implications of the unelected judicial branch's voiding of legislation adopted by the representatives, senators, and governor elected by the people of New Hampshire, not only for the public's perception of the courts but also for the comity each branch of government traditionally extends to the others.

The New Hampshire Supreme Court has adopted multiple rules of statutory construction designed to avoid a determination that a statute violates the constitution unless there is no alternative. *See, e.g., Sirrell v. State,* 146 N.H. 364, 369 (2001) (statutes are presumed to be constitutional) and *id.* at 370 (legislation found invalid only on " 'unescapable grounds' "); *see also Opinion of the Justices*, No. 2018-0267, slip op. of Lynn, C.J., and Hantz Marconi and Donovan, JJ., at 9 (N.H. July 12, 2018) (same). There is, however, a threshold issue that the courts must confront before they even reach these rules of construction, and that is whether the plaintiff has actually suffered harm as a result of the challenged legislation. Absent a showing of such harm, the plaintiff lacks standing to pursue the claim and the court lacks jurisdiction to adjudicate it. Although standing is a prerequisite to the adjudication of any claim, the requirement should be applied with particular scrupulousness in actions challenging the constitutionality of a statute. For the courts to entertain exercising their authority to nullify an act of the legislature – which is the outer limit of the judicial power – they must assure themselves that the person invoking that authority has actually been harmed by the legislation.

Once a defendant challenges a plaintiff's standing, the plaintiff has the burden to establish the requisite individual harm. Plaintiffs have successfully resisted two motions to dismiss on standing grounds, but they have not yet proven their standing in an evidentiary hearing. In light of the discovery that has taken place since Judge Temple denied defendants' motions to dismiss for lack of standing, defendants can now present evidence that SB 3 has

caused *no* harm to the plaintiffs. Before the court and the defendants expend a week or more in a preliminary injunction hearing, plaintiffs should be required to meet their evidentiary burden that they have sustained cognizable harm in a hearing where their testimony is subject to cross-examination.

II. Statement of Facts

The plaintiffs filed their complaints on August 22 and 23, 2017. After the consolidated case was remanded to the superior court from federal district court, the defendants filed a motion to dismiss for lack of standing on September 5, 2017. The court's ruling described the nature of the September 11, 2017, hearing on that motion: "[T]hrough no fault of the parties, [the court] could only schedule one three-hour block of time to hear arguments on the motion to dismiss and offers of proof on the motion for preliminary injunctive relief . . . . Given this extremely short period of time, the Court heard what can only be described as rushed offers of proof . . . [and] defendants were unable to perform cross-examination." Order (9/12/17) at 9. Based on what the parties were able to present during this inadequate hearing, the court found that plaintiffs Adriana Lopera and NHDP possessed standing and concluded that, as a result, all of the remaining plaintiffs had standing. *Id.* at 5-6. Judge Temple recognized that he had not considered all of the arguments that the defendants raised as to plaintiffs' standing. *Id.* at 7. Accordingly, the court noted that its initial finding regarding standing could be "subject to change after a full evidentiary hearing." *Id.* at 7, n.1. To date, no such hearing has occurred.

Because of Judge Temple's acknowledgment that he had not fully considered defendants' motion to dismiss, on September 26, 2017, the defendants filed a renewed joint motion to dismiss challenging the plaintiffs' standing. That motion argued – among other things – that Ms. Lopera possessed a document that would enable her to register to vote in accordance with SB 3 if

she actually attempted to do so (Def. Jt. Mot. to Dismiss (9/26/17) at ¶¶17-18) and noted that two of the other individual plaintiffs were already registered voters. *Id.* at ¶22. The plaintiffs responded by filing a motion to amend their complaint to add three individual plaintiffs who had not yet registered to vote. The defendants supplemented the renewed motion on December 19, 2017, with evidence demonstrating that Ms. Lopera had successfully registered and cast an absentee ballot in the municipal elections held on November 7, 2017. Def. Supp. to Jt. Mot. to Dismiss (12/19/17) at ¶4 and Ex. A.

Judge Temple again denied the motion to dismiss, but he did not hold an evidentiary hearing on the motion. Order (4/10/18) at 7-9. Instead, he relied on affidavits and representations made in the pleadings, concluding that the plaintiffs' "factual allegations" were sufficient to survive a motion to dismiss. He did not suggest that his order was the final word on plaintiffs' standing. To the contrary, he stated that, "[t]he plaintiffs are cautioned that they have the burden of proving standing at trial." *Id.* at 10. The court went on to say that "the defendants in this matter may re-raise the standing issue post-trial if they do not believe that the plaintiffs have demonstrated a sufficient legal injury." *Id.*

Since Judge Temple's April 10, 2018, order, defendants have deposed the individual plaintiffs and evaluated their productions of documents. Among other things, this discovery has yielded the following facts:

- Spencer Anderson produced e-mail correspondence from Dartmouth College identifying his on-campus address for the 2017-2018 school year.[1] Exhibit A.[2]

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[1] RSA 654:1, I-a provides that a student attending a New Hampshire institution of learning may "claim domicile for voting purposes in the New Hampshire town or city in which he or she lives while attending such institution . . . ." A letter from the institution stating the student's on-campus residential address is sufficient to satisfy this standard. RSA 654:12, I(c)(1)(B)(i).

[2] Personal identifying information concerning the plaintiffs' roommates, as well as potentially sensitive information contained in plaintiffs' government-issued documents, have been redacted from the exhibits to this motion.

- Seysha Mehta produced e-mail correspondence from Dartmouth College identifying her on-campus address for the 2017-2018 school year. Exhibit B.

- Garrett Muscatel produced e-mail correspondence from Dartmouth College identifying his on-campus address for the 2017-2018 school year. Mr. Muscatel also produced copies of his driver's license, vehicle registration, and the certificate of title for his vehicle, all of which establish his address in Hanover, New Hampshire. Exhibit C.

- Phillip Dragone produced e-mail correspondence from St. Anselm College identifying his on-campus address for the 2017-2018 school year. Exhibit D.

- Adriana Lopera produced a lease agreement for an apartment in Nashua, New Hampshire, and copies of her driver's license and vehicle registration reflecting that Nashua address. Exhibit E. Ms. Lopera also registered to vote in October 2017 and voted by absentee ballot in the Nashua municipal elections in November 2017. *Id.*

- Douglas Marino has been registered to vote in Stratham, New Hampshire, since the fall of 2016. He also produced a copy of his driver's license, which reflects his current address in Stratham, New Hampshire. Exhibit F.

These documents establish that each of the individual plaintiffs could register to vote if they actually tried to do so. While such documents are not *necessary* for registering to vote under SB 3, the fact that plaintiffs have that documentation means that they could satisfy the domicile requirements of SB 3 in mere moments if they chose to.

LWVNH's and NHDP's standing is equally suspect. They argue that they have standing because they voluntarily perform voter outreach and education activities. *See, e.g.*, LWVNH Am. Compl. at ¶9. In its April 10, 2018, order the court determined that LWVNH and NHDP alleged sufficient facts to establish standing because they allegedly would have to "diver[t] . . . time, talent, and resources to educate their voters and implement the requirements of" SB 3. Order (4/10/18) at 7. Again, the court reached this determination without an evidentiary hearing, and it was subject to the court's cautionary observation that the plaintiffs would still have the burden of proving their standing with competent evidence. *Id.* at 10.

More than two hundred special and municipal elections have taken place since SB 3 became law. LWVNH and NHDP have never been required to provide evidence that SB 3 impeded their voluntary voter outreach programs. Nor have they had to submit themselves to cross-examination on the issue of whether they have already diverted the "time, talent, and resources" necessary to modify their voter education programs to reflect the requirements of SB 3, rendering their claimed basis for standing moot.

III. Argument

Plaintiffs Have Not Yet Been Required to Meet Their Burden of Proving Their Standing and They Should be Made to do so Before the Preliminary Injunction Hearing

Standing is a question of subject matter jurisdiction that may be raised at any time. *Close v. Fisette*, 146 N.H. 480, 483 (2001) ("A challenge to subject matter jurisdiction may be raised at any time during the proceeding, including on appeal, and may not be waived.").[3] "In evaluating whether a party has standing to sue, [the court] focus[es]on whether the party suffered a legal injury against which the law was designed to protect." *Libertarian Party of New Hampshire v. Secretary of State*, 158 N.H. 194, 195 (2008) (quotation and citation omitted).

Here, the plaintiffs seek relief pursuant to RSA 491:22, the declaratory judgment statute, and RSA 498:1. LWVNH's Second Amended Compl. at ¶18; NHDP's Amended Compl. at ¶12. To have standing to seek declaratory judgment a plaintiff must establish "an impairment of a present legal or equitable right arising out of the application of the rule or statute under which the action has occurred." *Avery v. N.H. Dep't. of Educ.*, 162 N.H. 604, 608 (2011); *see also,*

[3] Indeed, Judge Temple recognized this point when he ruled on the defendants' renewed motion to dismiss for lack of standing. There, the court wrote, "In light of these changed circumstances, and recognizing that standing is a matter of subject matter jurisdiction *that may be raised at any time in the proceedings*, the Court will again address the issue of standing." Order (4/10/18) at 4 (emphasis supplied).

Asmussen v. Comm'r N.H. Dept't of Safety, 145 N.H. 578, 587 (2000) ("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." (Citation omitted.))

When a defendant challenges a plaintiff's standing to bring suit, "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." *Goldstein v. Town of Bedford*, 154 N.H. 393, 395 (2006) (emphasis supplied). The plaintiff bears the burden of proving standing. *See Ossipee Auto Parts, Inc. v. Ossipee Planning Board*, 134 N.H. 401, 403-04 (1991). The claimed injury cannot be based on a hypothetical set of facts. *Asmussen*, 145 N.H. at 587 (citing authority); *see also Pucket v. Hot Springs School District*, 526 F.3d 1151, 1161 (8th Cir. 2008); ("[I]f a plaintiff is required to meet a precondition or follow a certain procedure to engage in an activity or enjoy a benefit and fails to attempt to do so, that plaintiff lacks standing to sue because he or she should have at least taken steps to attempt to satisfy the precondition." (Brackets omitted.)); *Bernbeck v. Gale*, 829 F.3d 643 (8th Cir. 2016) (*quoting Pucket*, 526 F.3d at 1161). Nor does a party have standing where some event must occur in the future for the challenged law or decision to cause the requisite "injury in fact." *Appeal of Campaign for Ratepayers' Rights*, 142 N.H. 629, 632 (1998); *Appeal of Stonyfield Farm*, 159 N.H. 227, 231-32 (2009). *See also Howard v. State of Tennessee*, No. 17-6448 (6th Cir. July 9, 2018) at *5 and 10 (unpublished) (finding that the state's failure to follow protocol to permit a new voter to register was a cognizable injury which became moot after the plaintiff registered to vote.) *see also Lujan v. Defenders of Wildlife*, 504 U.S. 555, 573 (1992) (an injury must go beyond "his and every citizen's interest in proper application of the Constitution and laws."). As discovery and events have progressed, there has been increasing reason to doubt that the plaintiffs in this

case have standing. *Ante* at 4-5. Before the court and the defendants incur the time and expense of the lengthy preliminary injunction hearing on which plaintiffs have insisted, the plaintiffs should be required to meet their evidentiary burden of establishing their standing.

Accordingly, defendants respectfully request that the court schedule a one-day evidentiary hearing before the end of July at which the plaintiffs are required to establish their standing.

Respectfully submitted,

WILLIAM M. GARDNER,
SECRETARY OF STATE and
GORDON J. MACDONALD,
ATTORNEY GENERAL

By Their Attorneys,

GORDON J. MACDONALD
ATTORNEY GENERAL

Date: 7-12-18

Bryan K. Gould for

Anne M. Edwards, Esq. (NH Bar #6826)
Associate Attorney General
Anthony J. Galdieri, Esq. (NH Bar #18594)
Assistant Attorney General
Civil Bureau
33 Capitol Street
Concord, NH 03301
(603) 271-3658

and

Date: 7-12-18

Bryan K. Gould

Bryan K. Gould, Esq. (NH Bar #8165)
Cooley A. Arroyo, Esq. (NH Bar #265810)
Callan E. Maynard, Esq. (NH Bar #20799)
Cleveland, Waters and Bass, P.A.
2 Capital Plaza, P.O. Box 1137
Concord, NH 03302-1137
(603) 224-7761

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was transmitted by electronic mail and/or First Class mail, postage prepaid, to all counsel of record.

Date: 7-12-18

Bryan K. Gould

Bryan K. Gould, Esq.