THE STATE OF NEW HAMPSHIRE
SUPERIOR COURT

ROCKINGHAM, SS. SUPERIOR COURT

Daniel Richard

v.

Daniel Goonan, et al.

No. 218-2022-CV-00676

ORDER ON DEFENDANTS' MOTIONS TO DISMISS

Plaintiff Daniel Richard brings suit against Governor Christopher Sununu, Attorney General John Formella, Secretary of State David Scanlan, Speaker of the House Sherman Packard, and President of the Senate Chuck Morse, (collectively "State Defendants") and against Chairman of the Board of Selectmen for the Town of Auburn, Keith LeClair and Town of Auburn Administrator, Daniel Goonan (collectively, "Town Defendants")[1], seeking declaratory and injunctive relief concerning election laws and procedures. See Doc. 5 (Am. Compl.). On September 12, 2024, the New Hampshire Supreme Court vacated the Court's dismissal of Plaintiff's Count I and Counts III to VI with instructions to dismiss the claims for lack of subject matter jurisdiction. See Richard v. Governor, 2024 N.H. 53 ¶ 24 (Sept. 12, 2024). The supreme court remanded the remaining issue before the Court: Plaintiff's Count II, Equal Protection Claim. See id. ¶ 21. Defendants now move to dismiss. See Doc. 87 (Town Defendants' Mot. Dismiss); Doc. 94 (State Defendants' Mot. Dismiss). Plaintiff objects.

[1] The Court refers to both State Defendants and Town Defendants collectively as Defendants.

See Docs. 89–92 (Obj. to Town's Mot. Dismiss, Addendums, and Memo. of Law); Doc. 96 (Obj. to State's Mot. Dismiss). Town Defendants respond to Plaintiff's Objection. See Doc. 95. The Court has carefully considered the parties' arguments, the record, and the applicable law. For the reasons that follow, Town Defendants' motion to dismiss is **GRANTED** and State Defendants' motion to dismiss is **GRANTED**.

Background

The Court incorporates the following facts from its November 10, 2022 Order. See Doc. 65. Plaintiff, who resides and votes in the Town of Auburn, alleges that the Town denied him his right to vote in the March 9, 2022 election when the Town counted his vote through an electronic ballot counting device ("BCD"). Plaintiff challenges RSA 656:40, RSA 656:41, and RSA 656:42, which permit towns and cities to use BCDs. See Doc. 5 at 45. He brings his remaining claim under Part I, Article I of the State Constitution and the Fourteenth Amendment to the Federal Constitution.

Standard of Review

When ruling on a motion to dismiss, the Court considers whether "the plaintiff's allegations are reasonably susceptible of a construction that would permit recovery." Mentis Scis., Inc. v. Pittsburgh Networks, LLC, 173 N.H. 584, 588 (2020). In making this inquiry, the Court assumes the factual allegations in "the plaintiff's pleadings to be true and construe[s] all reasonable inferences in the light most favorable to the plaintiff." Id. Ultimately, the Court must "look at the facts alleged in the complaint and the applicable law and determine whether the allegations provide a basis for legal relief." Id. "If they do not," the Court should dismiss the complaint. Id. The Court need not, however, "assume the truth of statements . . . that are merely conclusions of law[]" not supported

by "predicate facts[.]" Gen. Insulation Co. v. Eckman Constr., 159 N.H. 601, 611–12 (2010).

Analysis

State Defendants now move to dismiss, arguing that Plaintiff's claim "fails as a matter of law because the challenged statutes do not create any classifications of individuals and do not treat similarly situated people differently." Doc. 94 ¶ 1. Town Defendants also move to dismiss, first asserting that because the only remaining claim was brought against State Defendants and not Town Defendants, no live allegation against the Town remains. Doc. 87 ¶ 5. Town Defendants, in the alternative, argue that because Plaintiff does not allege that the Town treated him differently than other voters, and because intra-state differences cannot form the basis for an equal protection claim, Plaintiff fails to state a claim upon which relief can be granted. Id. ¶¶ 7–8.

In response to State Defendants' motion, Plaintiff argues that by permitting 103 communities in New Hampshire to count ballots by hand, while also permitting 135 communities to count ballots by machine, there exists an unequal application of the election laws. Doc. 96 ¶ 49. He asserts that the Town's use of voting machines to count absentee ballots further deprives him of a "free, fair, and equal election process which dilutes his vote." Id. ¶ 25. As to Town Defendants' motion, Plaintiff asserts that the Town has waived its right to move to dismiss because they failed to answer Plaintiff's equal protection claim pursuant to Superior Court Rule 9 ("Rule 9"). See Doc. 92 at 1. He further alleges that the Town has "two different methods of sorting and counting ballots" which leads to him "being treated differently than the other voters in the Town of Auburn." Id. ¶ 28. Town Defendants in response argue that because these

facts were not alleged in Plaintiff's Amended Complaint, see Doc. 5, they are not properly before the Court on a motion to dismiss. Doc. 95 ¶ 7.

The Court first addresses State Defendants' motion. Because the Federal Constitution offers no greater protection than the State Constitution under its equal protection provisions, the Court relies on the State Constitution and will only use federal case law to aid in its analysis. LeClair v. LeClair, 137 N.H. 213, 222–23 (1993). "The equal protection provisions of the State Constitution are designed to ensure that State law treats groups of similarly situated citizens in the same manner." McGraw v. Exeter Region Coop. Sch. Dist., 145 N.H. 709, 711 (2001). When analyzing an equal protection challenge, the Court must first determine "whether the State action in question treats similarly situated persons differently." LeClair, 137 N.H. at 222 (quotation omitted). If, however, "persons are not similarly situated, then no equal protection problem is involved." McGraw, 145 N.H. at 712.

The challenged statutes—RSA 656:40, RSA 656:41, and RSA 656:42—permit municipalities to use BCDs and establish protocols for their use and regulatory oversight by the ballot law commission. Specifically, RSA 656:40 provides that "[t]he mayor and aldermen of any city or the selectmen of any town, subject to the approval of the ballot law commission, may authorize the use of one of the electronic ballot counting devises approved by the ballot law commission . . . for any regular or special election." (emphasis added). "The general rule of statutory construction is that the word 'may' makes enforcement of a statute permissive and that the word 'shall' requires mandatory enforcement." Appeal of Coös County Comm'rs, 166 N.H. 379, 386 (2014). The use of the permissive term "may", thus demonstrates the legislature's intent to allow

municipalities discretion in adopting this voting process. See id. The Court must therefore determine whether a municipalities' adoption of this permissive law gives rise to an equal protection claim.

Plaintiff's argument mirrors the plaintiff's argument in McGraw. In McGraw, the plaintiff argued that "all citizens who vote on bond issues are similarly situated and that [the statute in question] treat[ed] them differently based upon whether they live in an official ballot community or a town meeting community." 145 N.H. at 711–12. The crux of Plaintiff's equal protection argument is that citizens voting in communities where ballots are hand counted are similarly situated to those in a community which uses BCDs, and his vote is thus "diluted" in comparison. See Doc. 5 ¶ 59. In McGraw, the New Hampshire Supreme Court determined that if a statute "provides a different process for citizens voting under different forms of government; those voters are not similarly situated." 145 N.H. at 712. Citizens who choose to reside in municipalities that lawfully adopt the discretionary voting process of using BCDs, therefore, are not similarly situated to those who reside in municipalities that hand-count ballots. See id. Because these citizens are not similarly situated, Plaintiff's equal protection claim fails as a matter of law. McGraw, 145 N.H. at 712.

Even if the Court were to determine that the laws in question treated similarly situated persons differently, they would still pass constitutional muster. When "considering an equal protection challenge under our State Constitution, [the Court] must first determine the appropriate standard of review by examining the purpose and scope of the State-created classification and the individual rights affected." In re Sandra H., 150 N.H. 634, 637 (2004). The Court must "apply a balancing test to determine the

level of scrutiny" used to analyze the statute. Guare v. State, 167 N.H. 658, 663 (2015). "[W]hen the election law at issue subjects the plaintiff's rights to 'severe' restriction," the statute "must withstand strict scrutiny to be constitutional." Akins v. Sec'y of State, 154 N.H. 67, 72 (2006). "When 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. (quotations omitted).

As explained above, the statutes in question permit municipalities to use BCDs (see RSA 656:40), provides a structure by which the ballot law commission shall regulate municipalities' use of BCDs (see RSA 656:41), and establishes the ballot law commission's authority to adopt rules and protocols for their use (see RSA 656:42). The Court finds that these statutes are nondiscriminatory because they do not prohibit nor promote the State "invidiously discriminating between individuals or groups." See generally Washington v. Davis, 426 U.S. 229, 241 (1976) (explaining that the equal protection component of the Fifth Amendment prohibits the United States from unfair discrimination against individuals or groups). Rather, the statutes merely permit the use of an electronic tool and establish protocols whereby municipalities may use these tools to effectively conduct their elections. These tools and protocols promote efficient and accurate ballot counting which the Court finds is an important regulatory interest. Because these laws are reasonable and nondiscriminatory, and serve an important regulatory interest, the Court concludes that RSA 656:40–:42 do not violate Plaintiff's right to equal protection. See In re Sandra H., 150 N.H. at 640.

The Court's determination that the aforementioned statutes do not violate Plaintiff's right to equal protection is dipositive to all Defendants. Cf. State v. City of

Dover, 153 N.H. 181, 190 (2006) (holding municipalities were properly represented by the State). As to Plaintiff's argument that the Town treats him differently than other voters, Town Defendants correctly assert that Plaintiff first made this allegation in his Objection to the Town Defendants' Motion to Dismiss. " See Doc. 5 ¶ 59 ("[Plaintiff] has been disfranchised, and his vote diluted by said legislative acts" (emphasis added)). The Court therefore need not address an allegation that Plaintiff failed to raise in his complaint. See Skinny Pancake-Hanover v. Crotix, 172 N.H. 372, 378 (2019) (noting that the plaintiff's additional allegations were not originally pled in its complaint).

Although Plaintiff argues that Town Defendants waived their right to move to dismiss as to his equal protection claim, this is unsupported by the record. Superior Court Rule 9(b) provides that "[i]nstead of an Answer, a person responding to a pleading to which a response is required may, within 30 days after the person has been served with the pleading to which the Answer or response is required files a Motion to Dismiss." Town Defendants were served on September 8, 2022. See Docs. 40, 46. Thereafter, on October 3, 2022, State Defendants moved to dismiss, see Doc. 46, and Town Defendants joined the motion on October 4, 2022, see Doc. 47. Defendants' motions were thus timely filed within 30 days of service. See Super. Ct. R. 9(b). The Court therefore finds that Plaintiff's procedural argument is without merit.

Finally, the Court turns to Counts I and III through VI as directed by the supreme court to dismiss for lack of subject matter jurisdiction. See Richard, 2024 N.H. 53, ¶ 24. In his amended complaint, Plaintiff only alleges "generalized wrong[s] allegedly suffered by the public at large" rather than a legal injury specific to Plaintiff. See Avery v. Comm'r, N.H. Dep't of Corr., 173 N.H. 726, 737 (2020). Because Plaintiff only alleges

an “abstract interest in ensuring that the State Constitution is observed” and fails to plead “a personal, concrete interest,” Plaintiff lacks standing under the New Hampshire Constitution. See id. As such, the Court “lacks subject matter jurisdiction to adjudicate [Plaintiff’s] controversy.” Carlson, Tr. v. Latvian Lutheran Exile Church of Boston and Vicinity Patrons, 170 N.H. 299, 305 (2017). Plaintiff’s Counts I and III through VI are thus dismissed. See id.

Conclusion

For the reasons articulated in this Order, Town Defendants’ motion to dismiss is **GRANTED**, see Doc. 87, and State Defendants’ motion to dismiss is **GRANTED**, see Doc. 94.

SO ORDERED.

__March 28, 2025
DATE

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David W. Ruoff
Presiding Justice

Clerk's Notice of Decision
Document Sent to Parties
on 03/31/2025