THE STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS. SUPERIOR COURT
SOUTHERN DISTRICT

Docket No. 226-2022-CV-00233

603 Forward; Open Democracy Action; Louise Spencer; Edward R. Friedrich; and Jordan M. Thompson
v.
David M. Scanlan, in his official capacity as the New Hampshire Secretary of State; and John M. Formella, in his official capacity as the New Hampshire Attorney General; and New Hampshire Republican State Committee

and

Docket No. 226-2022-CV-00236

Manuel Espitia, Jr. and Daniel Weeks
v.
David Scanlan, in his official capacity as New Hampshire Secretary of State; and John Formella, in his official capacity as New Hampshire Attorney General; and
New Hampshire Republican State Committee

INTERVENOR'S RESPONSE TO PLAINTIFFS' REPLY TO COURT ORDER REGARDING STATUTORY INTERPRETATION AND STANDING

NOW COMES Intervenor New Hampshire Republican State Committee, by and through its counsel Lehmann Major List, PLLC, and states as follows:

I. Procedural History

All parties to the case have argued that SB 418 only applies to first-time New Hampshire registrants. To the extent that ends the matter, this Court already has before it a motion to dismiss based on the reading of SB 418 shared by the parties.

The Court, however, also invited the parties to address standing, in the event it adopts a broader reading of SB 418. In response, Plaintiffs have sought to dress up their standing arguments, which requires a brief reply. For the reasons set forth below, which amplify arguments in the state's motion to dismiss and reply, as well as Intervenor-Defendant's response

to the Court's order regarding the scope of SB 418, neither the individual plaintiffs nor the organizational plaintiffs have standing.

II. The Individual Plaintiffs Still Do Not Have Taxpayer Standing.

Plaintiffs allege, without much explanation, that a broader reading of SB 418 "could enhance" their standing as taxpayers. Not so. As Intervenor-Defendants have explained, taxpayer standing must rest on an assertion of the State specifically spending money in the face of some explicit legal prohibition. *Carrigan v. New Hampshire Department of Health and Human Services,* 174 N.H. 362, 370 (2021) (quoting *Duncan v. State*, 166 N.H. 630, 640 (2014)). The Supreme Court has never held that it is sufficient for a plaintiff to merely allege that government resources are used to implement an allegedly unlawful statute. And no reading of Part I, Article 8 or Supreme Court precedent supports such a reading.

Further, Plaintiffs' attempt to expand taxpayer standing in New Hampshire would produce problematic results. It would mean, for example, that any New Hampshire citizen could challenge the constitutionality of any criminal law if its implementation has consequences for the public fisc.[1] Or it would allow into court any New Hampshire citizen philosophically opposed to occupational licensing, which is implemented by a publicly financed Office of Professional Licensing and Certification, *see*, RSA 310-A:1, *et seq.,* without regard to whether the person is subject to the licensing scheme. Such a broad regime of taxpayer standing would convert the courts into a freestanding institution of legislative review. That has never been the law in New Hampshire. See *Duncan,* 166 N.H. at 643 ("the doctrine of standing serves to prevent the judicial process from being used to usurp the powers of the political branches").

[1] Enforcement of any criminal statute necessarily involves the expenditure of public funds for policing, prosecution, adjudication, and corrections.

III. Organizational Plaintiffs Do Not Have "Diversion of Resources" Standing.

Organizational plaintiffs 603 Forward and Open Democracy Action allege that a broader reading of SB 418 would "exacerbate the ongoing diversion of resources" by imposing even greater costs on their efforts to "educate their voters." *603 Forward Pltf.'s Reply* at 12. Plaintiffs fail to justify this conclusory assertion. But, perhaps more importantly, "diversion of resources"-based standing is a federal law doctrine derived from judicial interpretations of Article III of the federal Constitution. New Hampshire has never recognized the theory as a basis for standing in its courts, and even if this Court were to incorporate the doctrine into New Hampshire law as a matter of first impression, Plaintiffs have failed to plead facts sufficient to establish that the Act threatens to inflict upon them actionable "diversion of resources" harm.

603 Forward and Open Democracy Action fail to allege that they do anything other than engage in advocacy. They do not claim to provide goods, services, or counseling. 603 Forward states that it exists to "confront[] the generational crises facing New Hampshire by engaging in policy areas like public education reform, healthcare access, and voting rights," *603 Forward Compl*. ¶9, (quotations omitted), with a "mission above all else" being "the maintenance and promotion of a healthy democracy." *Id.* ¶10. For its part, Open Democracy Action's mission is to "bring about and safeguard political equality for the people of New Hampshire, which its founders believe will only happen through an open, accountable, and trusted democratic government of, by and for the people." *Id.* ¶11 (quotations omitted). Open Democracy Action claims it "pursues its mission through significant voter education efforts that focus on informing prospective voters about voter registration rules and advising voters on how to vote either through absentee ballot or in person." *Id.* ¶12. Nothing in the Complaint suggests in any way that

either organization provides products to, or serves, individual clients in any way. To the contrary, the Complaint and attached affidavits make it clear that they are pure advocacy organizations.

The organizational plaintiffs allege that the passage of SB 418 required them to update various materials used for communication and training, *Meyer Aff.* ¶8, *Zink Aff.* ¶¶13, 17, to change their public advocacy strategies, *Meyer Aff.* ¶¶9, 10, *Zink Aff.* ¶¶8, 9, 11, and to overcome alleged difficulties recruiting poll and election workers. *Meyer Aff.* ¶13, *Zink Aff.* 15. Both organizational plaintiffs allege that these activities will divert resources from their other interests. *Meyer Aff.* ¶¶5, 14 ("diverting existing resources and focus from … other programs and initiatives, including our work to advocate for better funding for higher education in New Hampshire and our work to create more affordable housing opportunities"); *Zink Aff.* ¶18 ("diversion of volunteer hours and financial resources described above will require … reallocation of resources away from other important programs, including campaign finance research projects, education about democracy, and grassroots mobilizing for participation in civic engagement.").

None of this establishes standing under New Hampshire law.

A. The New Hampshire Supreme Court Has Never Recognized Diversion of Resources Standing Under The New Hampshire Constitution.

Our Supreme Court has never held that New Hampshire standing law is coextensive with Article III, despite some overlap, and it has never suggested that New Hampshire courts are obliged to construe the standing restrictions in our Constitution in the same way that federal courts have construed Article III. To the contrary, New Hampshire courts have an obligation to construe the text of the New Hampshire Constitution independently. "If [New Hampshire courts] ignore this duty, [they] fail to live up to [their] oath to defend our constitution and we

help destroy the federalism that must be so carefully guarded by our people." *State v. Ball*, 124 N.H. 226, 231 (1983).

To establish standing in New Hampshire, "a party must allege a concrete, personal injury, implicating legal or equitable rights, with regard to an actual, not hypothetical, dispute, which is capable of judicial redress by a favorable decision." *Teeboom v. City of Nashua,* 172 N.H. 301, 307 (2019). "Requiring that a party claim a personal injury to a legal or equitable right "capable of being redressed by the court tends to assure that the legal questions presented to the court will be resolved, not in the rarified atmosphere of a debate society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action." *Duncan,* 166 N.H. at 643.

New Hampshire's standing requirements derive from our Constitution's explicit separation of powers provision, which cautions that the legislative, executive, and judicial powers be kept as separate from, and independent of, each other as the circumstances of a free government will admit. N.H.Const. Pt. I, Art. 37. New Hampshire's standing law therefore reflects heightened concern about an exercise of judicial power that could intrude upon a coordinate branch of government. This concern should cause the Court to remain particularly circumspect about adopting a view of standing, like "diversion of resources," that would permit it to review the constitutionality of an act of the legislature when the parties before the Court do not claim the kind of personal harm historically required to establish standing.

The Court should not extend established New Hampshire standing law to incorporate the "diversion of resources" theory, as it would blow the doors off separation of powers in New Hampshire. The alleged injury in this case is that the organizations have been compelled to change their educational materials and training to stay up-to-date. In other words, that they must

do what any organization must do to respond to the passage of time. Organizations update their materials all the time, and there is no allegation in the record that they would not have updated their materials but for SB 418. SB 418 might have altered the content of those updates. But the allegations are insufficient to establish that SB 418 added any material costs to updates that would have occurred in the normal course. Moreover, the need for organizations to alter their materials is the type of response that would attend to *any and every* legislative action. And they can claim no right to unchanging state laws. In our modern society, there are interest groups with vested interests in nearly every aspect of New Hampshire law. They produce materials to educate their constituents, whether they are commercial or non-commercial in nature. Construing a mere "diversion of resources" to be sufficient to confer organizational standing to challenge a legislative enactment would virtually ensure that New Hampshire courts become a forum for advocacy groups to continue fights that they have already lost in the legislature. In short, permitting such attenuated interests to confer standing would eviscerate the concrete legal injury requirement in New Hampshire laws that helps ensure that courts remain judicial, rather than legislative, in nature.

B. Even Under An Article III Analysis, The Plaintiffs Lack Standing Under The "Diversion Of Resources" Theory.

Even if the Court was to apply the Article III "diversion of resources" theory of standing in the same manner that federal courts apply it, the Plaintiffs still have not alleged sufficient facts to confer organizational standing. The familiar and irreducible requirements of Article III standing are: (1) an "injury in fact," which is (a) concrete and particularized; and (b) actual or imminent and not conjectural or hypothetical; (2) that the injury be fairly traceable to the challenged action; and (3) that the injury will likely be redressed by a favorable decision. *See*,

Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (U.S.1992). Plaintiffs do not allege facts sufficient to meet this test.

A. Injury in Fact

An organization suffers an injury in fact for purposes of standing when the defendant's actions impair "its *ability to provide its services or to perform its activities*." *Black Voters Matter Fund, Inc. v. Kemp*, 870 S.E.2d 430, 441 (Ga.2022) (emphasis added). In other words, Plaintiffs must first identify a "concrete and demonstrable injury to the organization's activities," and it must be something that may be evidenced by "the consequent drain on the organization's resources." *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982). An injury is only concrete if an organization alleges that the defendants have actually and directly impeded their activities, not merely compromised their mission. *Abigail Alliance for Better Access to Developmental Drugs v. Eschenbach,* 469 F.3d 129, 133 (D.C. Cir. 2006) (citing *Nat'l. Treasury Employees Union v. United States,* 101 F.3d 1423, 1429-30 (D.C. Cir. 1996)). Absent such an allegation of direct conflict, "it is entirely speculative whether the defendant's conduct is impeding the organization's activities." *Nat'l. Treasury Employees Union,* 101 F.3d at 1430. And "the alleged injury to the organization likely will be one that is shared by a large class of citizens and thus insufficient to establish injury in fact." *Id.* (citing *Warth v. Seldin,* 422 U.S. 490, 499 (1975) (emphasis added)).

Plaintiffs make no allegation that SB 418 impedes their ability to engage in advocacy to advance the issues they identify as important, nor that SB 418 creates a "direct conflict" with their mission. *Nat'l. Treasury Employees Union,* 101 F.3d at 1430. SB 418 says nothing whatsoever about how advocacy organizations pursue their interests, train their volunteers, or communicate with the public.

Instead, they only allege that SB 418 has caused them to expend unspecified resources to adjust their educational materials and advocacy to align them with SB 418, to retrain volunteers, and to print new training materials, pamphlets, and correspondence. But this is the kind of activity that they very likely would have engaged in regardless of the passage of SB 418. "In the absence of any harm to the plaintiffs' activities, the alleged diversion of resources is nothing more than a self-inflicted budgetary choice." *Electronic Privacy Info. Ctr. v. Presidential Advisory Comm'n on Election Integrity,* 878 F.3d 371, 379 (D.C. Cir.2017).

Further, resource diversion in service of mere "advocacy" is insufficient to confer standing. *See Equal Means Equal v. Ferriero,* 3 F.4th 24 (1st Cir. 2021). In *Ferriero*, the court found insufficient allegations that the plaintiff organizations had "incurred expenses . . . *by generating educational materials* to contact government officials, and to educate and *inform [the organization's] members, supporters and the general public* about" their missions. *Id.* at 30 (cleaned up) (emphasis added). The court noted that organizations "cannot establish standing if the 'only injury arises from the effect of [a challenged action] on the organization's lobbying activities, or when the service impaired is pure issue-advocacy." *Id.* (citation omitted) (emphasis added). "Otherwise, … any individual or organization wishing to be involved in a lawsuit could create a[n organization] for the purpose of conferring standing, or could adopt [a mission] so that the [organization] expressed an interest in the subject matter of the case, and then spend its way into having standing." *Id.* (quoting *Blunt v. Lower Merion Sch. Dist.,* 767 F.3d 247, 288 (3d Cir. 2014)).

Ferriero is sufficient to put to rest organization plaintiffs' claims to standing. Plaintiffs have established that they are advocacy organizations. 603 Forward has alleged that its "advocacy to combat SB 418" will in some non-specific way divert resources from some non-

specific other activities. *603 Forward Compl.* ¶10. Open Democracy Action alleges vaguely that its volunteers will "reallocate their time away from other Open Democracy Action priorities…," but likewise does not state what projects it intends to forego. *603 Forward Compl.* at ¶13. These vague assertions are insufficient to establish harm.

Finally, a plaintiff does not suffer an injury in fact under diversion-of-resources standing unless that an organization's activities have been "'perceptibly impaired' because it has 'diverted *significant* resources to counteract the defendant's conduct.'" *Texas State LULAC v. Elfant,* 52 F. 4th 248, 253 (5th Cir. 2022) (quoting *Tenth St. Residential Ass'n v. City of Dallas*, 968 F.3d 492, 500 (5th Cir. 2020)(emphasis added)). *De minimis* injuries occasioned by the diversion of *de minimis* resources are insufficient to open the courthouse doors.

Plaintiffs make no attempt to meet the "significant" threshold, because they cannot. There are no allegations that any incremental printing costs attributable to SB 418 are or might be significant, either in absolute terms or relative to the organizations' resources. Indeed, the record is entirely silent as to the scope and volume of the educational materials that the organizations believe they need to update. In short, the organizations seek to invoke the powers of this court pointing to little more than some unspecified printing costs that may or may not be attributable to SB 418, even in part. That's not enough to support diversion of resources standing.

B. Fairly Traceable

Further, the "fairly traceable" requirement means Plaintiffs establish that, "as a *consequence* of [the] injury…a diversion of an organization's resources [was required] to combat that impairment." *Id.* (emphasis added). *Black Lives Matter Fund, Inc.,* 870 S.E.2d at 441. An organizational plaintiff must show it diverted resources "as a direct result of" the challenged

law." *Texas State LULAC v. Elfant*, 52 F.4th 248, 254 (C.A.5, 2022) (*citing City of Kyle*, 626 F.3d at 238 (explaining the diversion of resources must be made in order to respond to the challenged law). A plaintiff who fails to do so fails to satisfy the traceability and redressability prongs of Article III standing. *Id*.

Here, Plaintiffs have not sufficiently alleged their injury is fairly traceable to any illegal conduct by the defendants. Plaintiffs have not identified any other programs or activities that would be perceptibly impaired by the alleged diversion of resources. In conclusory fashion, they have said that SB 418 will divert resources away from "other programs and initiatives," *Meyer Aff.* ¶14, and from "campaign finance research projects, education about democracy, and grassroots mobilizing for participation in civic engagement." *Zinc Aff.* ¶18. But that is not enough. These references fail to identify a single, specific program that they will be "required to forego."

Plaintiffs do not allege, for example, that they would not have altered their educational materials but for SB 418. And how could they? In the 2023 legislative session, the General Court also passed HB 336, a bill that changed the language on ballots instructing voters how many candidates they can vote for in each race. Presumably, the Plaintiffs must update their voting materials to reflect this change as well.

The requirements of Article III, concrete injury in fact, harm fairly traceable to the defendant's actions, and redressability, demand more than this. The organizations lack standing.

III. Conclusion

For the forgoing reasons, the Court should find that both the individual plaintiffs and the organization plaintiffs lack standing.

Respectfully Submitted
New Hampshire Republican
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By its attorneys,
Lehmann Major List, PLLC

/s/Richard J. Lehmann

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CERTIFICATION

I hereby certify that a copy of this pleading was this day forwarded to opposing counsel via the court's electronic service system.

July 27, 2023 */s/Richard J. Lehmann*

Richard J. Lehmann