VERMONT SUPERIOR COURT
Orleans Unit
247 Main Street
Newport VT 05855
802-334-3305
www.vermontjudiciary.org

CIVIL DIVISION
Case No. 23-CV-00382

Sleigh Law PC v. Farzana Leyva et al

ENTRY REGARDING MOTION

Title: Motion to Amend Complaint; Motion to Dismiss for Temporary and Permanent Injunction of Gubernatorial Appt. of F. Leyva or Any Other Person; Amended Complaint (F. Leyva & Phil Scott) (Motion: 2; 3)
Filer: David C. Sleigh; Sarah E. B. London
Filed Date: February 06, 2023; February 10, 2023

The motions are GRANTED.

This is an action seeking to remove Orleans County State's Attorney Farzana Leyva, neutralize her appointment by Governor Phil Scott, and require that Orleans County conduct a special election. Plaintiffs are clients of Attorney David Sleigh, Esq., facing criminal prosecution in Orleans County.[1] Defendants in this case are Attorney Farzana Leyva and Governor Phil Scott. As detailed below, Plaintiffs initially filed a Complaint requesting a preliminary injunction five days before Attorney Leyva was to be sworn-in as Orleans County State's Attorney, which the Court understood to be a request to rule on this issue on an emergency basis as allowed by V.R.C.P. 65. The Attorney General's Office on behalf of the Defendants filed an opposition to this injunction as well as a Motion to Dismiss. The Court denied the emergency preliminary injunction and gave the parties time to amend the complaint and submit additional briefing. Plaintiffs have filed a motion to amend their complaint and a

[1] In an amended complaint, the plaintiffs who are identified at the time of filing as clients Sleigh Law, P.C., are listed as Robert Deaette, Rebecca Poquette, Joseph Gaudreau, Jason Belisle, Brent McClure, Trent Columbia, George Pepin, Brian Naylor, Luke Perry, Jr., Timothy Bosley, Courtney Gilfillan, Tyler Gomes, Glenn Porter, Jeremy Sanville, Benjamin Marcoux, Brandon Baraw, Jean Paul Souliere, Jared Lefebvre, Benjamin Cooper, Parker Clark, Tonya Jarvis, Edward Rose, Hunter Judd, Paula Lawrence, Christine Geraldi, Howard Collins, Nicole Crowley, Matthew Eldridge, Mutsumi Hata, Judith Agostinello, and Steven Lontine. At this stage of the filing, the Defendants have not sought to verify or challenge any of these individuals or determine their current status either as clients of Sleigh Law or as defendants in on-going prosecutions in the criminal division of Orleans Superior Court.

renewed motion for an injunction, and the Attorney General's Office has filed a renewed opposition to the injunction and a renewed Motion to Dismiss. Plaintiffs have filed a timely opposition to the Motion to Dismiss. The matters presently before the Court are Plaintiffs' Motion to Amend, and the Defendants' Motion to Dismiss.[2] As discussed below, the Court **Grants** Plaintiffs' Motion to Amend and Defendants' Motion to Dismiss.

I. Background

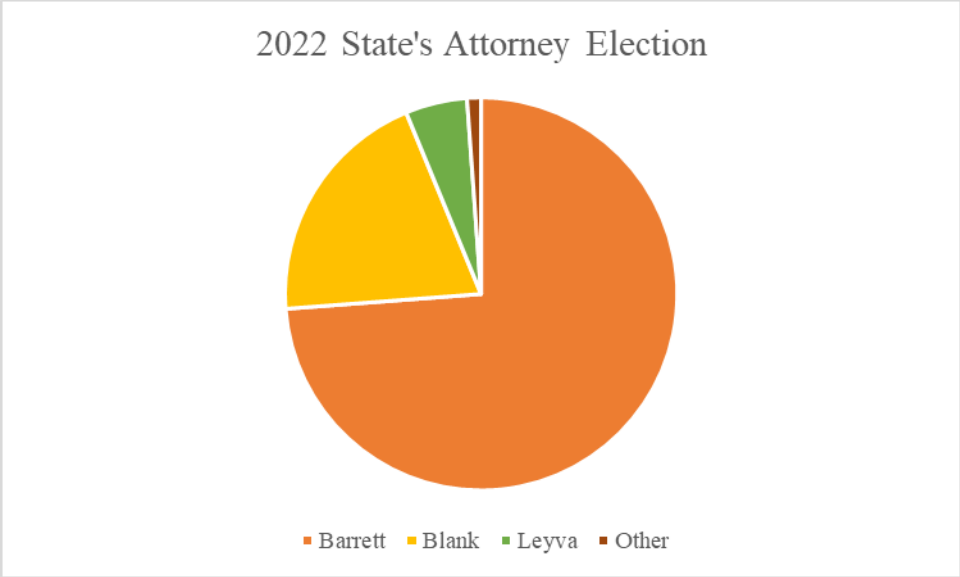
In August 2022, Governor Phil Scott appointed then-Orleans County State's Attorney Jennifer Barrett to the superior court bench.[3] Judge Barrett was officially sworn in as a Superior Court Judge on September 23, 2022. Def's Ex. A.[4] Judge Barrett's appointment to the bench left the position of Orleans County State's Attorney vacant, and Barrett's deputy, Attorney Farzana Leyva, became interim State's Attorney for Orleans County.

In November 2022, the State of Vermont held its quadrennial election for the position of State's Attorney in each of its 14 counties. Prior to her appointment to the bench, Judge Barrett had announced her intent to run for re-election and had won the Republican primary for Orleans County State's Attorney. No other candidate had sought either the Republican or Democratic nomination or had put their name forward as an independent. Due to the timing of the ballot deadlines for this election, Judge Barrett was unable to withdraw her name prior to the issuance of ballots for 2022 November election, which began mailing three days after Judge Barrett's swearing-in. Nevertheless, Judge Barrett had informed the Secretary of State on September 22, 2022, that she was not campaigning for the position of State's Attorney and would not serve if

[2] Under Rule 65, a preliminary injunction requires a hearing before the Court can issue an injunction, based on the dispositive nature of the Attorney General's Motion to Dismiss, the Court has taken this motion up first and because it disposes of the matter, there is no need to consider Plaintiffs' compliance with Rule 65 or to set for a hearing.
[3] The Court has taken notice of the following details of Judge Barrett's appointment, resignation, and Attorney Leyva's appointment as matter of public record, of which the Court may take judicial notice. Kaplan v. Morgan Stanley & Co, Inc., 2009 VT 78, ¶ 4, n.4 ("Similarly, it is well settled that, in ruling on a Rule 12(b)(6) motion to dismiss, courts may properly consider matters subject to judicial notice, such as statutes and regulations, and matters of public record.").
[4] Since Judge Barrett's appointment occurred when the Senate was not in session, she took office as an interim appointee and was subject to confirmation after serving. Vt. Const. Ch. II, § 33. This interim appointment process does not affect the validity of the judicial officer's appointment or right to serve. One of the most high-profile examples of this was Judge Frank Mahady who was appointed and began to serve on the Vermont Supreme Court in August 1987 but withdrew his name in March 1988 when he faced opposition based on personal financial issues. *David Karvelas*, *Mahady Withdraws Name*, Burlington Free Press (Apr. 1, 1988). In Judge Barrett's case, she was confirmed on Feb. 21, 2023. 2023 Vt. Sen. J. 166 (Feb. 21, 2023).

elected. Def. Ex. A. Nevertheless, Judge Barrett's name went forward on the November ballot as the sole listed candidate, and she won a majority of votes in the November election for State's attorney (Fig. 1).[5]

Figure 1:



After the election, Judge Barrett promptly notified the Vermont Secretary of State on November 10, 2022 that she again declined the office and would not serve due to her position as a Vermont Superior Court Judge. Def's Ex. A. This was more than a theoretical statement or a conceit subject to whim, mood, or fancy. The Vermont Code of Judicial Conduct governs, among others, all superior court judges in the state. The Rules under the Code do not allow judges to continue practicing law and serving in official functions outside of a few limited exceptions. Specifically, Rule 3.10 of the Vermont Code of Judicial Conduct states that "A judge shall not practice law." Rule 3.4 states that "A judge shall not accept appointment to a governmental committee, board, commission, or other governmental position . . . " Together with Rule 4.1, which bars judges from engaging in political caucuses, meetings, elections, or standing as a candidate while holding judicial office, these rules effectively and practically barred Judge Barrett from engaging in the Office of State's Attorney from the moment that she was sworn-into her judicial position.

[5] All election results and information from the Vermont November 2022 elections are available online at https://sos.vermont.gov/elections/election-info-resources/elections-results-data/.

On January 27, 2023, Governor Scott officially appointed Attorney Leyva to carry out the remainder of Judge Barrett's 2019-23 term ending on January 31, 2023. Def.'s Ex. B. On January 31, 2023, Governor Scott appointed Attorney Leyva to serve the new 2023-27 four-year term as Orleans County State's Attorney. Def.'s Ex. C.

II. Procedural History

Plaintiffs filed their initial Complaint on January 26, 2023. Plaintiffs at that time were identified as "All Clients of Sleigh Law, P.C., with Prosecutions Pending before the Criminal Division of the Orleans Superior Court." The Complaint also included a motion for a permanent injunction against Attorney Leyva's or any other person's appointment to the Office of State's Attorney. Plaintiffs argued that Governor Scott did not have the authority to appoint a State's Attorney and that Orleans County must hold a special election to elect a new State's Attorney.[6]

On January 31, 2023, the Attorney General's Office, on behalf of the Defendants, filed an objection to Plaintiffs' initial Complaint and a Motion to Dismiss. Defendants initially argued that Plaintiffs did not have standing and pointed out that the Complaint did not name any actual, individual Plaintiffs as required under V.R.C.P. 17. Additionally, Defendants argued that Plaintiffs failed to state a claim. Finally, Defendants argued that even if Plaintiffs' claims survived the Motion to Dismiss, they are still not entitled to injunctive relief.

On February 1, 2023, the Court denied Plaintiffs' motion for an emergency injunction to prevent Defendant Leyva from being sworn into office that day and gave Plaintiffs seven days to cure its issue with the real party in interest under V.R.C.P. 17. The Court allowed the parties additional time to file supplementary briefing in support of both a preliminary injunction as well as the motion to dismiss. On February 6, 2023, Plaintiffs filed a Motion to Amend the Pleading. They have sought to cure the Rule 17 issue by replacing the original category of Plaintiffs with a list of individual client names. The complaint also adds that Plaintiffs are all criminal defendants in Orleans County with pending criminal matters. All but four plaintiffs purport to reside in Orleans County.[7]

---

[6] If this matter were to have survived the Motion to Dismiss phase there is a substantial issue with the proposed remedy since none of the named Defendants have the authority to order or implement a special election.

[7] Notwithstanding this change, both the original complaint and the amended complaint are verified by Attorney Sleigh who is not one of the complainants. In traditional chancery, an attorney could verify a client's complaint, but

The Attorney General's Office filed an amended motion to dismiss on behalf of the Defendants on February 10, 2023. Defendants argue that Plaintiffs do not allege a particularized injury that is attributable to Defendants. Therefore, Defendants argue that Plaintiffs lack standing. Additionally, Defendants argue that Plaintiffs lack a cause of action and that their arguments are meritless.

Plaintiffs filed an opposition to this motion on February 17, 2023. In the memorandum, Plaintiffs address standing and irreparable harm issues, argue for a special election, and state that this case does not implicate the Political Question Doctrine. Defendants have responded on February 24, 2023, with a memorandum in reply in further support of their Motion to Dismiss. Defendants reiterate their previous arguments.

III. Legal Analysis

As a preliminary matter, Plaintiffs' Motion to Amend needs to be addressed as it directly affects the subsequent Motion to Dismiss analysis. Under V.R.C.P. 15(a), a Motion to Amend "shall be freely given when justice so requires." Vermont has a "tradition of liberally allowing amendments to pleadings where this no prejudice to the other party." *Colby v. Umbrella, Inc.*, 2008 VT 20, ¶ 4. Permission to amend is usually only denied where there is a showing that the amendment was the result of undue delay, was made in bad faith, is a futile amendment, or creates prejudice to the opposing party. *Perkins v. Windsor Hosp. Corp.*, 142 Vt. 305, 313 (1982).

---

the right to do so was potentially voidable and required leave of the Court. *Leblanc v. Deslandes*, 117 Vt. 248, 250 (1952) ("The plea is also bad for the reason that it was signed on behalf of the defendants by their attorney. A plea to the jurisdiction must be signed by a defendant in person. An attorney is supposed to have signed by leave of the court."). While other jurisdictions allowed more flexibility with who could verify, this usually arose by rule or statute. See generally, *Sufficiency of Verification of Pleading by Person Other than Party to Action*, 7 A.L.R. 4 § (I)(a)(3) (1920) (collecting cases). Modern Courts have also allowed verification by an attorney subject to a specific statute or rule but have noted that such "verification does not automatically transform" a verified complaint into an affidavit. See, e.g., *Dandford v. City of Syracuse*, 2012 WL 4006240, at *2 (N.D.N.Y. 2012) (noting that the attorney signed the verified complaint pursuant to N.Y. C.P.L.R. § 3020(d)(3)). While V.R.C.P. 11 has eliminated the general verification requirements of chancery, the Reporters Notes to Rule 11 state that verification remains required for certain motions, including injunctions under Rule 65. There is no accompanying statute or rule in Vermont that allows an attorney or third-party to perform this verification. This is important because Rule 65 specifically calls for factual verification, and a claimant's attorney is not normally in a position to provide such. Nevertheless, the Court will treat this as a voidable, rather than jurisdictional, issue in the present case and allow Plaintiffs claims to proceed to analysis, rather than outright dismissal. See 71C.J.S. *Pleading* § 501 (2023 update) (noting that most jurisdictions treat such issues as voidable, subject to specific objections from a party).

In the present case, the motion to amend arose, in part, in response to the Court's February 1, 2023 Order inviting Plaintiffs to cure their Rule 17 party-in-interest issues. As such, the Amended Complaint is an effort by Plaintiffs to cure technical issues and to allow the Court and parties to address the substance and gravamen of the Complaint. There is no prejudice to Defendants in allowing such an amendment. In fact, Defendants appear to have accepted this amendment and have tailored their motions to the issues raised by the Amended Complaint. Therefore, Plaintiffs Motion to Amend is **Granted,** and the Court will use the Amended Complaint for purposes of analyzing Defendants' Motion to Dismiss.

A. 12(b)(1) – lack of subject matter jurisdiction

Turning to Defendants' Motion to Dismiss, the Court's analysis begins with the question of whether Plaintiffs have standing. Plaintiffs must allege sufficient facts in the complaint to confer standing. *Town of Cavendish v. Vermont Pub. Power Supply Auth.,* 141 Vt. 144, 147–48 (1982). The Plaintiff in every case or controversy must have standing. *Parker v. Town of Milton*, 169 Vt. 74, 77 (1980). If a party lacks standing, then it lacks the immediacy of injury and the need for a remedy, and it is effectively asking the Court to rule on the law in the absence of a live dispute. This, in turn, renders any decision by the Court an advisory opinion, which is disallowed. *Brod v. Agency of Natural Resources*, 2007 VT 87, ¶ 8 ("Vermont courts are without constitutional authority to issue advisory opinions.") (citing *Parker*, 169 Vt. at 77). The standing requirement also enforces the separation of powers between the branches of government. *Parker*, 169 Vt. at 77 ("The standing and case or controversy requirements thus enforce the separation of powers between the three different branches of government by confining the judiciary to the adjudication of actual disputes and preventing the judiciary from presiding over broad-based policy questions that are properly resolved in the legislative arena.").

To determine whether a plaintiff has standing, the Court applies the test articulated in *Lujan*, which the Vermont Supreme Court expressly adopted. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992); *Hinesburg Sand & Gravel Co., Inc., v. State*, 166 Vt. 337, 341 (1997). This test includes three elements: (1) injury in fact; (2) causation; and (3) redressability. *Hinesburg Sand & Gravel Co., Inc.*, 166 Vt. at 341. Put another way, the injury cannot be a "generalized harm to the public." *Parker*, 169 Vt. at 78.

First, Plaintiffs must allege an injury-in fact-for the court to hear their case. An injury-in-fact exists if the Plaintiffs can allege sufficient facts to show that Defendants invaded Plaintiffs' legally protected right. *Turner v. Shumlin*, 2017 VT 2, ¶ 11, 204 Vt. 78. Here, Plaintiffs argue that Governor Scott improperly appointed Attorney Leyva, and therefore Plaintiffs have suffered harm to their due process rights. Def. Amended Complaint at 2 (filed Feb. 7, 2023) ("The rights to due process are immediately and irrevocably violated by the continued prosecution by an illegitimate prosecutorial 'authority.'"). Plaintiffs all have pending criminal cases in Orleans County where Attorney Leyva is State's Attorney. Id.

The role of the state's attorney has been called the "highest law enforcement officer in the county." *O'Connor v. Donovan*, 2012 VT 27, ¶ 5, 191 Vt. 412. The role of the state's attorney includes oversight, direction, and discretion in all criminal prosecutions in the county (apart from those done by the Attorney General's Office). 24 V.S.A. § 361. As the Vermont Supreme Court has noted, state's attorneys are accorded "considerable statutory and constitutional powers" and are protected by the same type of immunity for "high executive officials" as the Attorney General enjoys. *O'Connor*, 2012 VT at ¶ 21.

Given this power and shield from scrutiny, it is of the highest importance to ensure that the individual purporting to be a county's state's attorney is, in fact, the properly elected or appointed official. While this might be an issue of general concern for any resident of Orleans County, it is a particular and heightened concern for any resident who is also facing criminal prosecution. An improper prosecutor has the potential to complicate a defense and any lack of authority has the potential to raise questions as to the state's attorney's authority in either the trial or post-conviction process undoing the certainty and finality that any litigant has a right to expect out of the criminal justice process. The Court finds that having pending cases before an allegedly illegitimate State's Attorney, at this stage of the pleadings, is a sufficient injury to cross the threshold of the injury-in-fact requirement.

Second, Plaintiffs must show causation. If Governor Scott's appointment of Attorney Leyva was illegitimate, then this would be the direct cause of the injuries Plaintiffs allege. This is because Governor Scott is the person who appointed Attorney Leyva after she was not elected

and after Judge Barrett resigned and refused to serve. Most importantly, Attorney Leyva, as State's Attorney, is the law enforcement officer in direct charge of prosecuting Plaintiffs.

Finally, the court must be able to redress the injury caused by Defendants. When challenging the legality of a government action, Plaintiffs must show that the government's conformance with the law would redress their injury. *Brod*, 2007 Vt at ¶ 10. If Attorney Leyva is an illegitimate State's Attorney, removing her from office so a legitimate State's Attorney can assume the office would redress the injury. The court has the power to interpret and apply the law. *In re D.L.*, 164 Vt. 223, 228 (1995) ("Briefly stated, the legislative power is the power that formulates and enacts the laws; the executive power enforces them; and the judicial power interprets and applies them.").

Based on this analysis, the Court finds that Plaintiffs have satisfied the threshold requirements for standing at this stage of the pleadings, and the Court is obligated to look into the substantive legal claims behind Defendants' Motion to Dismiss.

B. De Facto Officer Doctrine

The de facto officer doctrine does not apply here because Attorney Leyva is a party to the case. *State v. Oren*, 160 Vt. 245, 247 (1993); *State v. Cuomo*, 2013 VT 101, ¶ 8, * ("This Court recognizes that the de facto officer doctrine does not apply in cases where the officer 'with defective title' is a party to the case.").

C. 12(b)(6) – failure to state a claim

The court will grant a motion under V.R.C.P. 12(b)(6) when there is a "failure to state a claim upon which relief can be granted . . ." The court grants a motion to dismiss for failure to state a claim when "it is beyond a doubt that there exist no facts or circumstances that would entitle the plaintiff to relief." *Boland v. Est. of Smith*, 2020 Vt 51, ¶ 5, 212 Vt. 386 (quotation omitted). Taken together, the bare allegations in the complaint must be sufficient to show that the plaintiff is entitled to relief. *Vitale v. Bellows Falls Union High School*, 2023 WL 2543757, ¶ 28–29 (2023). "Motions to dismiss for failure to state a claim are disfavored and are rarely granted." *Colby v. Umbrella Inc.*, 2008 VT 20, ¶ 5, 184 Vt. 1 (citing *Gilman v. Me. Mut. Fire Ins. Co.,* 2003 VT 55, ¶ 14, 175 Vt. 554 (mem.).).

Here, the court addresses each of Plaintiffs' arguments to determine whether Plaintiffs allege facts to show Plaintiffs are entitled to relief.

When interpreting constitutional and statutory provisions, the court seeks to implement the intent of the drafters, voters, and legislators. *State v. Lohr*, 2020 VT 41, ¶ 5, 212 Vt. 289. To do this, the Court first looks at the plain meaning of the Vermont Constitution and relevant statutory sections. *Turner*, 2017 VT at ¶ 25; *State v. Madison*, 163 Vt. 360, 368 (1995). Where the plain language is determinative, the court will apply that meaning. *State v. Pellerin*, 2010 Vt 26, ¶ 7, 187 Vt. 482 ("If the plain language is clear and unambiguous, we will enforce it according to its terms.") (citing *State v. O'Dell,* 2007 VT 34, ¶ 7, 181 Vt. 475) (quotations omitted).

a. *Constitutional authority*

The Vermont Constitution vests the governor with the authority to:

> [C]ommission all officers, and also to appoint officers, except where provision is, or shall be, otherwise made by law or this Frame of Government; and shall supply every **vacancy** in any office, occasioned by death or otherwise, until the office can be filled in the manner directed by law or this Constitution. . . .

Vt. Const. Ch II, § 20 (emphasis added).

Plaintiffs argue that this appointment power is limited only to when a vacancy is created by death or resignation of an incumbent. In *Turner*, the Vermont Supreme Court addressed the issue of what a vacancy is. *Turner*, 2017 VT at ¶ 26. There, the Court adopted the plain meaning of the word "vacancy":

> 1. The quality, state, or condition of being unoccupied, esp. in reference to an office .... 2. The time during which an office ... is not occupied. 3. An unoccupied office ....; a vacancy, properly speaking, does not occur until the officer is officially removed. 4. A job opening; a position that has not been filled.

Id. (citing Black's Law Dictionary). Therefore, a vacancy only exists once the office holder actually leaves the job. In this case, Judge Barrett resigned her office several times beginning in September 2022, but most meaningfully on November 10, 2022, immediately following the election for the State's Attorney's new term beginning in February 2023. Def's Ex. A. This resignation left the office unoccupied and disclaimed by the one potential claimant who could

occupy the seat because she had just won the election. The facts show that Governor Scott did not immediately appoint Attorney Leyva but waited until the eve of the term. At that point, Judge Barrett had not revoked her resignation and was continuing to serve in a position that rendered her legally unable to re-occupy the State's Attorney's Office. Given that he had just been re-elected and sworn into a new term of office, Governor Scott was the only individual either directly before or directly after who could appoint a successor to Judge Barrett as Orleans County State's Attorney. At that juncture, all of the issues and powers were aligned. Governor Scott was the duly elected Governor with the power and authority under Chapter II, Section 20 of the Vermont Constitution to make appointments. Also, the position of Orleans County State's Attorney for both the 2019-2023 and 2023-27 terms had been vacated by the only person authorized to take office through the election.

There may be a punctilio as to whether the actual vacancy should be considered ripe from the moment of Judge Barrett's resignation or the moment when she failed to appear and accept her oath of office, or at some other point, but this is a largely academic distinction because the vacancy became clear as soon as Judge Barrett accepted her judicial appointment and was further effectuated by her resignation. As discussed below, there is persuasive authority to show that it is the absence of the person and not the change of the term that creates the vacancy and triggers the right to appoint a successor, but it is important to note that the *when* in this case is of little consequence given the continuing authority of Governor Scott to appoint at any relevant time during this matter and Judge Barrett's months-long notice of resignation.

This distinction between vacancy and term lay at the heart of the Vermont Supreme Court's decision in *Turner v. Shumlin*. 2017 VT 2. In that case, Justice Dooley announced in the fall of 2016 that he did not intend to stand for reappointment and would retire the following spring. Id. at ¶ 2. Then-Governor Peter Shumlin announced a vacancy and convened the Judicial Nominating Board to select candidates from which the Governor intended to appoint a replacement prior to leaving office at the beginning of January 2017. Id. at ¶¶ 3–4. Several members of the Vermont House and Senate challenged this action on the grounds that Justice Dooley's vacancy had not occurred because he continued to hold office and would continue to do so well into the term of Shumlin's successor's Governor Phil Scott. Id. at ¶¶ 5, 7. The Vermont Supreme Court ultimately determined that Governor Shumlin could not appoint Justice

Dooley's successor because his continued service meant the office was not vacant, even though the end of the term had been established. In addition to the Black's Law Dictionary Definition quoted above, the Court offered the following analysis that is worth quoting at length:

> [Vermont Constitution] Sections 32 and 33 do not empower the Governor "to create vacancies but only to fill them." See *State ex rel. Foughty v. Friederich*, 108 N.W.2d 681, 690 (N.D. 1961) (construing constitutional provision giving governor power to fill vacancy). When a constitution, such as is the case with the Vermont Constitution, contains no provision authorizing the Legislature to determine when any office shall be deemed vacant, "a vacancy does not exist in a constitutional office so long as the office is supplied in a manner provided by the Constitution with an incumbent who is legally qualified to exercise the powers and perform the duties which pertain to it." Id. As the North Dakota Supreme Court stated:
>
> > Any vacancy that warrants an appointment must be a vacancy in the office, not in the term. No vacancy occurs while the office is being held by one occupying it under a tenure prescribed by the Constitution unless the Constitution so provides. As we have pointed out, the Constitution recognizes no vacancies except those which are vacancies in fact. It does not create or declare vacancies in constitutional offices nor does it confer upon the legislature authority to do so.
>
> Id. at 690–91.
>
> The same is true of the Vermont Constitution. The section in the Vermont Constitution that permits the General Assembly to "establish procedures for the implementation of the provisions of sections thirty-two through thirty-six" does not authorize the Governor to create, as opposed to fill, a vacancy. Vt. Const. ch. II, § 36. Pursuant to that section, the Legislature has established procedures for the filling of vacancies, including those on the Vermont Supreme Court. Section 602(b) of Title 4 provides that "[w]henever a vacancy occurs in the office of a Supreme Court Justice ... or when an incumbent does not declare that he or she will be a candidate to succeed himself or herself [pursuant to 4 V.S.A. § 4(c)], the [Judicial Nominating] Board shall submit to the Governor the names of as many persons as it deems well qualified to be appointed to the office." (Emphasis added.) This provision, upon which respondent relies, cannot expand the governor's power beyond that established in the Constitution. See *Youngblood v. Marr*, 253 Ind. 412, 254 N.E.2d 868, 871–72 (1970) (stating that legislature cannot declare vacancy under constitution when in fact no vacancy exists).

Turner v. Shumlin, 2017 VT 2, ¶¶ 27, 28.

The key concept, which is repeated again at footnote 8 in this decision is that **vacancies must be in the office and not in the term**. Id. at ¶ 32, n. 8 (emphasis added). This is illustrated in the case of *McRae v. State ex rel. Hyche*, 112 So.2d 487 (Ala. 1959). In that case, an incumbent sheriff was re-elected to office but died a month before his new term began. Id. at 488. The then-current, but outgoing, governor appointed a successor for the remainder of the Sheriff's term and for the new term. Id. The incoming governor who was to be sworn-in the same day as the new sheriff's terms started appointed a different successor. Id. The Alabama Supreme Court ultimately found in favor of the outgoing governor, ruling that the death created a vacancy that was timely filled. Id. at 492. The Alabama Supreme Court came to this conclusion by reviewing a number of cases where an elected official became unable to serve a new term of office prior the terms commencing, whether by death or other reasons. Id. at 490–92. The Alabama Supreme Court enunciated three important concepts.

First, the Alabama Court noted that "the law disfavors any vacancy in office." Id. at 491. Second, the Alabama Court noted that vacancies occur for a number of reasons and any use of the term should be applied liberally because vacancies arise for a variety of reasons including death, failure to elect, failure to appoint, and resignation. Id. Third and finally, the Alabama Court wrote that a:

> [C]areful study of the [prior cases dealing with vacancies] clearly indicates a deliberate holding by this Court that the governor in office at the time a vacancy occurs is vested with the power of appointment to fill the vacancy, and that such power exists even though the term which is vacant has not commenced and will not commence until the expiration of the term of the then governor.

Id. at 492. The reasoning of the Alabama case follows the concept of vacancy and principles adopted by the Vermont Supreme Court in *Turner* in that it focuses on the physical and actual absence or inability of the duly elected officer to serve. For this reason, this Court finds the analysis of *McRae* to be persuasive and illustrative of how the reasoning in *Turner* provides guidance to the present matter.

Under this analysis, the Orleans County State's Attorney's Office became vacant on November 10, 2022 when Judge Barrett, then serving as a Vermont Superior Court Judge, delivered her resignation and intent not to serve. This stated intent, coupled with her earlier

resignations, and her affirmative actions to become a judge legally put her out of the office in an irrevocable manner, which in turn triggered Governor Scott's authority under Section 32 to act to appoint and avoid a vacancy in office.

Based on this analysis, the Court finds that a vacancy was created, and nothing in the Vermont Constitution prevented Governor Scott from appointing Attorney Leyva as Orleans County State's Attorney. For these reasons, Plaintiffs cannot survive the 12(b)(6) motion to dismiss on constitutional grounds.

b. Statutory authority

In addition to the Constitutional language analyzed above, the Vermont legislature also created a statutory way for the Vermont governor to fill vacancies in any office:

> (a) In the event of a vacancy in any State, county, or legislative office, the Governor may request the political party or parties of the person whose death or resignation created the vacancy to submit one or more recommendations as to a successor. The proper committee to which a request for recommendation shall be directed shall be:
> (1) for State officers, the State committee;
> (2) for county officers, except justices of the peace and Probate judges, the county committee;
> (3) for State Senator, the senatorial district committee;
> (4) for State Representative, the representative district committee;
> (5) for justice of the peace, the town committee;
> (6) for Probate judge, the probate district committee.
> (b) The Governor may appoint a qualified person to fill the vacancy for the remaining portion of the term, whether or not the appointee is recommended by the party committee.

17 V.S.A. § 2623 (a)–(b).

Plaintiffs argue that the Vermont governor can only fill the position of State's Attorney if the vacancy is caused by a death or resignation of an incumbent. As explained above, the Vermont Constitution does not support this reading. Additionally, 17 V.S.A. § 2623 includes the language "death or resignation created the vacancy . . ." but the section is predicated by the use of the word "may." While 17 V.S.A. § 2623 does include the language Plaintiffs rely on, the section does not create any mandatory requirements for the governor. Regardless, 17 V.S.A. § 2623(b) also provides that "the Governor may appoint a qualified person to fill the vacancy for

the remaining portion of the term." Therefore, the Constitutional provisions regarding the governor's appointment power for the office of State's Attorney is not otherwise defined by this statute.

Plaintiffs argue their interpretation of 17 V.S.A. § 2623 using the canon of construction *expressio unis est exclusion alterius* "the expression of one thing is the exclusion of another." Where the plain language of a statute is unambiguous, the court does not apply canons of construction. *T.C. v. L.D.*, 2020 VT 19, ¶ 8, 211 Vt. 582 (citing Wesco, Inc. v. Sorrell, 2004 VT 102, ¶ 14, 177 Vt. 287.). The plain language here is dispositive, so the Court will not apply any canons of construction. 17 V.S.A. § 2623(b) acts as a catch-all when the governor chooses to appoint a qualified person without recommendations from a political party. Plaintiffs' interpretation is also at odds with at least another jurisdiction that considered the question under a similar statutory structure and found that the limited reasons for a vacancy did not exclude considering actual vacancies arising for reasons outside the statute. *McRae*, 112 So.2d. at 491 (finding that the enumerated situations leading to a vacancy in office did not prevent or exclude the determination of an actual vacancy for another cause outside the statute).

The point of this analysis is that like with the constitutional analysis, the Court reads 27 V.S.A. § 2623 in light of the focus on vacancy and not term. The purpose of Section 2623 from its plain language is not to narrow the Constitutional power but to enable it. For these reasons, Plaintiffs' argument that Section 2326 should be read to narrow the more general power of appointment is unavailing.

Beyond this analysis, there is also an absence of statutory authority for the remedy that Plaintiffs seek to compel. If the legislature wanted to trigger special elections when certain vacancies in state's attorney offices arose, the legislature failed to include a mechanism to do so. This is not because the legislature does not conceive of such a process. In fact, the legislature is fully capable of creating such provisions and has designated special elections in certain other scenarios. For example, the Vermont Legislature requires a special election when there is a vacancy in the office of U.S. Senator or Representative:

> (a) If a vacancy occurs in the office of U.S. Senator or U.S. Representative, the Governor shall call a special election to fill the vacancy. His or her proclamation

> shall specify a day for the special election and a day for a special primary, pursuant to section 2352 of this title.
> (b) The special election shall be held not more than six months from the date the vacancy occurs, except that if the vacancy occurs within six months of a general election, the special election may be held the same day as the general election provided the ballots for the special election are able to be distributed by the deadline set forth in section 2479 of this title.

17 V.S.A. § 2621.[8] This shows that the Vermont Legislature has contemplated special elections in other circumstances. That makes its choice to not dictate a special election for state's attorneys all the more apparent. The right to a special election is not inherent within the Vermont election system. See *Town of Brattleboro v. Garfield*, 2006 VT 56, ¶¶ 1–13 (affirming the denial of a citizen petition to hold a special election where it was not authorized by statute). While *Town of Brattleboro* deals with municipal charter, the Court understands its denial to be broader and rejecting any inherent right to seek a special election outside of a specific statutory grant. While the Court has freedom to fashion a remedy, without clear legislative intent or authority, the Court would be running afoul of the separation of powers by agreeing with Plaintiffs' argument. This would unilaterally create a right to a special election out of whole cloth where such is neither authorized by the Vermont Constitution or by statute and which is not sought by the executive branch. Vt. Const. Ch. II, § 5 ("The Legislative, Executive, and Judiciary departments, shall be separate and distinct, so that neither exercise the powers properly belonging to the others."); see also *In re D.L.*, 164 Vt. at 229 ("The focus of a separation of powers inquiry is not whether one branch of government is exercising certain powers that may in some way pertain to another branch, but whether the power exercised so encroaches upon another branch's power as to usurp from that branch its constitutionally defined function."). Such a remedy appears to be the most convoluted and least supported remedy conceivable for what is a straightforward application of an inherent Constitutional authority.

Based on this analysis, the Court concludes that Plaintiffs' arguments regarding the statutory limitations of 17 V.S.A. § 2326 must fail as a matter of law, and dismissal is appropriate under V.R.C.P. 12(b)(6).[9]

---

[8] The Legislature has approved similar provisions for the City of Burlington, which requires a special election, rather than appointments, to fil any vacancies in the offices of mayor, city council, or school commissioner, regardless of the cause of such vacancy. 24 App. V.S.A. §§ 3-128, 3-165.

c. *Due process*

Plaintiffs' last argument alleges general injuries to Plaintiffs' due process rights. "To establish a claim for a violation of procedural due process rights, a party must show that he or she was deprived of a constitutionally protected interest." *In re New England Police Benev. Ass'n*, 2016 VT 67, ¶ 16, 202 Vt. 318. The protected interest must be within the purview of the Fourteenth Amendment of the U.S. Constitution. *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 570–71 (1972); *In re New England*, 106 VT at ¶ 16. Because Governor Scott's appointment of Attorney Leyva is a legitimate exercise of his authority to appoint a successor to office upon its vacancy, Plaintiffs are not deprived of a constitutional right. Plaintiffs do not otherwise allege an injury to their due process rights under the Fourteenth Amendment. The Court does not find Plaintiffs' arguments meritorious under the Vermont Constitution or Vermont statutory law. Consequently, Plaintiffs fail to have a claim that their due process rights are infringed.

IV. Conclusion

Based on the facts and analysis above, the Court concludes that Governor Scott properly appointed Attorney Leyva as Orleans County State's Attorney to fill a vacancy created when Judge Barrett took office as a Vermont Superior Court Judge, resigned and disclaimed any right she had to take office after the outcome of the November 2022 general election. Plaintiffs have failed to state a claim upon which relief can be granted. Although courts are extremely hesitant to grant a motion to dismiss, it is appropriate here.

The Vermont Constitution is clear that a governor can appoint a state's attorney when a vacancy arises. The record shows that Judge Barrett resigned after the November election for the term starting February 1, 2023. Governor Scott waited until the new term started to appoint Attorney Leyva to the position. The Court finds that there was a vacancy in office at the time the Governor made this decision. As well, the Vermont Legislature did not limit Governor Scott's power to appoint Attorney Leyva to this position. While the Vermont Legislature has chosen to

[9] Given the Court's ruling on the plain language of the constitutional and statutory provisions, the Court does not reach the Political Question Doctrine, particularly because it does not reach the issue of remedy, but the Court remains concerned that such a remedy would directly impact this doctrine. *Brady v. Dean*, 173 Vt. 542, 544 (2001). Along with Court's concern expressed in footnote 6.

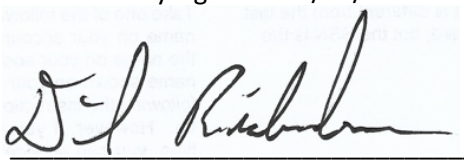
require a special election in other circumstances, it has not done so when it comes to vacancies in the State's Attorney offices.

Without such authority from the Legislature, the Court, even if it was inclined not to find a vacancy had occurred, would decline to apply the proposed remedy. In effect, Plaintiffs seek to impose a limited and stilted reading of both Section 32 and 17 V.S.A. § 2326, which by extension creates a need for a remedy, which is not otherwise called for or authorized by the legislature. The Court is persuaded the more reasonable and consistent reading of Section 32 and 17 V.S.A. § 2326 is to read them as focused on the actual vacancy in office, rather than the term of office and allowing appointments to occur when such a vacancy arises with substantial certainty, as in this case. This interpretation is consistent with both the Constitutional language, prior case law, and the existing statutory structures.

ORDER

For these reasons, Plaintiff's Motion to Amend is **GRANTED.** Defendants' Motion to Dismiss for failure to state a claim is **GRANTED**. This matter is hereby **DISMISSED** as a matter of law**.**

Electronically signed on 4/17/2023 4:30 PM pursuant to V.R.E.F. 9(d)



Daniel Richardson
Superior Court Judge