VERMONT SUPERIOR COURT
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CIVIL DIVISION
Case No. 22-CV-02582

H Paige v. James Condos et al

Opinion and Order

On July 26, 2022, Plaintiff H. Brooke Paige filed his "Administrative Election Complaint under 17 V.S.A. 2458 and Related Petition for Declaratory Judgment and Injunctive Relief," naming the State of Vermont and Secretary of State James Condos as Defendants. Paige states that he "does not seek to have this Court overturn the 2022 Election Law Changes codified in Act No. 60 (S.15) of 2021," [hereinafter "Act 60"]. Instead, he complains that in the State's "haste to expand ballot access and collection," it failed to require "important safeguards" that will cause the 2022 election to be "ripe for error, mistake and/or fraud." Complaint, ¶ 35. He proffers a number of remedies for these alleged shortcomings.

Paige initially requested injunctive relief that would: 1. order Defendants to distribute the ballots by USPS Certified Mail - First Class Mail; 2. order Defendant Condos to implement a specific set of measures to regulate vote harvesters; 3. order Defendant Condos to implement a surveillance program to monitor the ballot collection boxes, or alternatively, order Defendant Condos to close the collection boxes and have voters use USPS collection boxes or drop ballots off at post offices or town clerks; 4. and order Defendant Condos to "facilitate 'universal' ballot curing"

and instruct election officials to allow voters to cure their own ballots "for any reason." Complaint, ¶ 37(A)–(E). Although Paige also states that his Complaint is filed pursuant to 12 V.S.A. § 4711 and Vt. R. Civ. P. 57, he does not specify the declaratory judgment that he seeks. At the hearing on October 3, 2022, Paige voluntarily withdrew his request for an injunction ordering Defendants to send the ballots by certified mail. His other claims for injunctive relief remain.

In response, the State move for dismissal under Vt. R. Civ. P. 12(b)(1) and 12(b)(6), arguing that the Court does not have jurisdiction to hear Paige's claims because Paige did not exhaust the administrative remedies available under 17 V.S.A. § 2458 and lacks standing. It also opposed his request for injunctive relief.

On October 2, 2022, the Court held a hearing on Defendant's motion to dismiss and on Paige's Motion for a Preliminary Injunction.

For the reasons discussed below, the Court grants Defendants' Motion to Dismiss and denies the request for a preliminary injunction.

Analysis

In reviewing a motion to dismiss under Vt. R. Civ. P. 12(b)(1), the Court accepts as true all uncontroverted factual allegations of the complaint and construes them in the light most favorable to the nonmoving party. *Rheaume v. Pallito*, 2011 VT 72, ¶ 2, 190 Vt. 245, 247. For purposes of considering Defendants' motion to dismiss under Vt. R. Civ. P. 12(b)(6), the Court considers all the factual allegations of the complaint to be true and decides whether "it appears beyond doubt that there exist no facts or circumstances that would entitle the plaintiff to relief." *Davis v.*

Am. Legion, Dep't of Vermont, 2014 VT 134, ¶ 12, 198 Vt. 204, 209. Merely "[c]onclusory allegations or legal conclusions masquerading as factual conclusions" do not suffice to shield a complaint from dismissal. *Colby v. Umbrella, Inc.*, 2008 VT 20, ¶ 10, 184 Vt. 1, 9 (quoting *Smith v. Loc. 819 I.B.T. Pension Plan*, 291 F.3d 236, 240 (2d Cir. 2002)).

I. Exhaustion of Administrative Remedies

Defendants first argue that the Court lacks subject-matter jurisdiction over this action. A party must exhaust available administrative remedies before filing suit when expressly mandated by statute. Where the statute does not include a clear requirement of exhaustion, "sound judicial discretion governs." *Mullinnex v. Menard*, 2020 VT 33, ¶ 13, 212 Vt. 432, 236 (quotations omitted). "[E]xhaustion of administrative remedies is a presumed requirement, and the burden is on the party seeking to bypass the administrative process to show that it fits within an exception to this general rule." *Id.*, ¶ 14, 212 Vt. 432, 236 (quoting *Luck Bros., Inc. v. Agency of Transp.*, 2014 VT 59, ¶ 20, 196 Vt. 584, 594–595). The rule that a party must first exhaust administrative remedies before turning to the court for relief "serves the dual purposes of protecting the authority of the administrative agency and promoting judicial efficiency." *Jordan v. State Agency of Transp.*, 166 Vt. 509, 512 (1997) (citing *McCarthy v. Madigan,* 503 U.S. 140, 145 (1992)). "To allow complainants to bypass their administrative remedies deprives 'the parties and the courts [of] the benefit of the administrative agency's experience and expertise,' and

denies 'the agency the opportunity to cure its own errors.' " *Mullinnex*, 2020 VT 33, ¶ 14, 212 Vt. at 178 (quoting *Pratt v. Pallito*, 2017 VT 22, ¶ 14, 204 Vt. 313, 319).

Vermont's election statutes require the Secretary of State to adopt rules creating a procedure for complaints regarding the conduct of Vermont elections like the upcoming one. 17 V.S.A. § 2458(a). Such a process has been established, and the Secretary entertains complaints regarding claimed violations of law in connection with Vermont elections. The process also allows an individual making such a complaint to appeal an adverse determination to the Superior Court in the county where the individual resides. 17 V.S.A. § 2458(d).

Because the statute does not expressly mandate exhaustion, it is a matter of judicial discretion to decide whether it is required in this case. *Mullinnex*, 2020 VT 33, ¶ 13, 212 Vt. at 236

In this instance, the Court concludes that vital purposes would have been served by first undertaking the Secretary's administrative process. By bypassing the available administrative remedies provided by the Secretary of State, Paige afforded the Secretary no chance to hear Paige's concerns and conduct proceedings to determine, based on the Secretary's own election experience and expertise, whether Paige's fears might warrant relief. It also precluded the Secretary from assembling a full record examining the merits of Paige's claims and considering the potential impacts of his position on other voters, state/town officials, and the entire election process. That, in turn, deprived the Court of an important administrative record. Moreover, if Paige had exhausted the available administrative remedies,

the Court might then have been able to conduct a review on the record under Vt. R. Civ. P. 74. *See Paige v. State of Vermont*, No. 20-CV-00307, slip op. at 3–4 (Vt. Sup. Ct., Sept. 8, 2020) (Zonay, J.), *appeal dismissed as moot*, *Paige v. State*, No. 2020-280, 2021 WL 2534554, at *3 (Vt. Apr. 9, 2021) (unpublished mem.).

To the extent that Paige's claims raise issues under Vermont's Constitution related to the mailing and collection of ballots, such claims would also benefit from the development of an administrative record. *See Town of Bridgewater v. Dep't of Taxes*, 173 Vt. 509, 512 (2001) (mem.) ("If administrative hearings could be circumvented every time a complaint raises a constitutional issue, the public would lose the benefit of agency expertise, undermining the goal of agency review.").

Because Paige failed to exhaust administrative remedies regarding any of his claims, the Court does not have jurisdiction to hear this complaint. *Jordan*, 166 Vt. at 511.

Paige takes nothing from his assertion that he should not be required to avail himself of the complaint process because the Secretary has an alleged underlying conflict of interest. In support of that claim, Plaintiff points out that the Judicial Conduct Board has ruled, in another matter that Paige pursued, that "the Secretary of State is simply not part of Vermont's 'unified judicial system,' including when the office is deciding a complaint under 17 V.S.A. § 2458." Complaint, Exh. C at 2. This argument is unavailing because the statute, the Judicial Conduct Board's determination, and the Court's ruling based on exhaustion doctrine are all consistent with the structure of Vermont's government: the Legislature empowered

the Executive to provide a complaint process that, once completed, is subject to review by the Judiciary. *See Luck Bros. v. Agency of Transp.*, 2014 VT 59, ¶ 20, 196 Vt. 584 ("[W]e generally will not interfere with an agency's decisions regarding issues within its legislatively permitted jurisdiction unless and until all administrative remedies have been invoked." (quotation omitted)).

The fact that Secretary Condos is not subject to the Code of Judicial Conduct simply has no bearing on whether an individual with grievances under Section 2458 must first complete a complaint process with the Secretary of State's office before the Court has jurisdiction to hear an appeal of the outcome of the complaint. The Secretary is an elected official who is empowered to decide complaints by statute. If Paige's reasoning were sound, there would be no reason for the statute to mandate that the Secretary implement a complaint procedure because he would always be recused. Indeed, administrative agencies often determine matters that they regulate. Paige's position would run directly counter to the exhaustion doctrine and preclude administrative examination of many disputes. Such a result is not warranted.

II. Standing

Defendants next contend that even if Plaintiff had exhausted the available administrative remedies, he would still lack standing to pursue his claims. "Vermont courts are vested with subject matter jurisdiction only over actual cases or controversies involving litigants with adverse interests." *Brod v. Agency of Nat. Res.*, 2007 VT 87, ¶ 8, 182 Vt. 234 (citing *Agency of Natural Res. v. U.S. Fire Ins.*

Co., 173 Vt. 302, 306 (2001)). Part of the case-or-controversy requirement is standing. *Hinesburg Sand & Gravel Co. v. State*, 166 Vt. 337, 340 (1997). To have standing in this case, Paige "must present a real—not merely theoretical—controversy" regarding "the threat of actual injury to a protected legal interest"; it is not sufficient to "merely speculat[e] about the impact of some generalized grievance." *Brod*, 2007 VT 87, ¶ 9, 182 Vt. at 239 (quotations omitted).

Paige complains that "Universal Vote-by-Mail … opens the election process to substantial election errors, omissions and fraud." Complaint, ¶ 20. He worries that the law allows for and does not do enough to monitor vote harvesting, which could lead to abuse and fraud. *Id*., ¶¶ 21-24. He alleges that ballot collection boxes do not provide sufficient security. *Id*., ¶¶ 25-26. He faults the law for limiting the opportunities for voters to "cure" defective ballots, and alleges that expanded vote curing could reduce fraud. *Id*., ¶¶ 27-29.

There is no standing and no case or controversy unless Paige shows that he "is suffering the threat of actual injury to a protected legal interest" rather than "merely speculating about the impact of some generalized grievance." *Town of Cavendish v. Vermont Pub. Power Supply Auth.*, 141 Vt. 144, 147 (1982). His complaint speculates about errors, omissions, and fraud that could theoretically occur, but none of the allegations amount to an actual injury to him in particular as a voter or a candidate. The right to vote is "individual and personal in nature." *Reynolds v. Sims*, 377 U.S. 533, 561 (1964). "Thus, voters who allege facts showing disadvantage to themselves as individuals have standing to sue to remedy that

disadvantage." *Gill v. Whitford*, 138 S. Ct. 1916, 1929 (2018). A "citizen's abstract interest in policies adopted by the legislature, [however,]. . . is a nonjusticiable 'general interest common to all members of the public.' " *Id*. at 1931 (quoting ***Ex** parte Levitt,* 302 U.S. 633, 634 (1937) (*per curiam*). "If every voter suffers the same incremental dilution of the franchise caused by some third-party's fraudulent vote, then these voters have experienced a generalized injury." *Martel v. Condos*, 487 F. Supp. 3d 247, 253 (D. Vt. 2020) (Crawford, J.) (dismissing for lack of standing plaintiffs' claims "that the new processes in place for the 2020 general election in Vermont have an excessive error rate" where the complaint "propose[s] a different system with heightened security"). As the U.S. Court for the District of Vermont has noted: "It is unnecessary to decide whether [the] proposed change is a good idea or not since the standing doctrine does not permit everyone and anyone to bring a lawsuit to challenge the merits of legislation." *Id*.

In the past, Vermont trial courts have dismissed prior complaints by Paige based on similar reasoning. In regard to the 2020 election, Paige filed a complaint challenging the mail-ballot system based, *inter alia*, on similar alleged fears of voter fraud and vote harvesting. It was dismissed for lack of standing. *Paige v. State of Vermont*, No. 20-CV-00307, slip op. at 5 (Vt. Sup. Ct., Sept. 8, 2020) (Zonay, J.), *appeal dismissed as moot*, *Paige v. State*, No. 2020-280, 2021 WL 2534554, at *3 (Vt. Apr. 9, 2021) (unpublished mem.). The Court determined that Paige lacked standing because his concerns about potential fraud and ballot harvesting "consist[ed] of theoretical harms to the election process rather than threats of actual

injury being caused to a protected legal interest." *Id.* at 4. In concluding Paige lacked standing to challenge the qualifications of candidates for President, the Washington Superior Court, likewise, explained that 17 V.S.A. § 2458 "may purport to permit one to file a complaint," but it does not "create[ ] standing in the constitutional sense." *Paige v. State*, No. 780-12-15 Wncv, slip op. at 3 (Vt. Sup. Ct., May 12, 2016) (Tomasi, J.), *aff'd on other grds*, *Paige v. State*, 2017 VT 54, ¶ 1, 205 Vt. 287, 288. A similar 2012 challenge by Paige to candidate qualifications for office was dismissed by the trial court for lack of standing as "an impermissible generalized grievance." *Paige v. State*, 2013 VT 105, ¶ 5, 195 Vt. 302, 305. *See also Paige v. State*, 2018 VT 136, ¶¶ 6, 15, 209 Vt. 379, 383, 387 (challenge to school mergers dismissed for lack of standing because Paige was not "directly injured in a cognizable way" by the law in question). Just so here.

Paige's citation of *Noble v. Secretary of State* No. 48-9-10 Excv, slip op. at 6 (Vt. Sup. Ct., Oct. 21, 2010) (Manley, J.), does not change that calculus. Paige cites *Noble* for the proposition that he has standing because the statutes allow any voter to bring a complaint when "an injury in fact need only be reasonably expected." No. 48-9-10 Excv, slip op. at 6 (Vt. Sup. Ct., Oct. 21, 2010) (Manley, J.) (quoting *Brod*, 2007 VT 87, ¶ 9, 182 Vt. at 239). In *Noble*, however, the plaintiff brought his complaint *after* a primary election had already occurred, and the complaint challenged the legitimacy of a candidate who would run unopposed in the upcoming election. *Id.* Thus, the Court concluded that the plaintiff had standing because the injury-in-fact could be reasonably expected. The injuries of which Paige complains,

on the other hand, are hypothetical errors and fraudulent acts that cannot reasonably be expected to occur.

Paige lacks standing to pursue his complaint because he merely speculates what kinds of general harms will occur to the electorate if the Secretary of State does not adopt Paige's proposed methods of ballot mailing, collection, and oversight; and fails to show any particular injury to himself from that process.[1] *See Parker v. Town of Milton*, 169 Vt. 74, 77 (1998). The allegations in the complaint are simply too vague and attenuated to be actionable. Ultimately, the actions that Paige requests, in the absence of injury-in-fact, amount to a demand that the Court replace its judgment for that of the legislature as to the need and benefit of such procedures. As noted by our High Court, however: "The standing doctrine protects the separation of powers between the branches of government by ensuring that courts confine themselves to deciding actual disputes and avoid intervening in broader policy decisions that are reserved for the Legislature." *Paige*, 2018 VT 136, ¶ 8, 209 Vt. at 384.

Because Paige lacks standing, the Court does not have subject matter jurisdiction to grant the declaratory or injunctive relief that he requests.

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[1] This is true of all of Paige's claims, including his claims under 17 V.S.A. § 2458 and his requests for injunctive and declaratory relief. The Complaint also purports to articulate a claim under 17 V.S.A. § 2603, yet alleges no injury-in-fact. That statute allows only for complaints related to error, fraud, or invalidity of an election filed "within 15 days after the election in question, or if there is a recount, within 10 days *after* the court issues its judgment on the recount." 17 V.S.A. § 2603(c) (emphasis added).

III. Preliminary Injunction[2]

Even if the Court did not dismiss the complaint for failure to exhaust administrative remedies and lack of standing, the Court would decline to grant a preliminary injunction. An injunction is an "extraordinary remedy," and Paige bears the burden of showing that his right to such relief is "clear." *Okemo Mountain, Inc. v. Town of Ludlow*, 171 Vt. 201, 212 (2000); *see* Vt. R. Civ. P. 65. In assessing claims for injunctive relief, the Court is guided by four considerations: "(1) the threat of irreparable harm to the movant; (2) the potential harm to the other parties; (3) the likelihood of success on the merits; and (4) the public interest." *Taylor v. Town of Cabot*, 2017 VT 92, ¶ 19, 205 Vt. 586, 596 (internal quotation omitted). As the United States Court of appeals has further specified: "A showing of irreparable harm is the single most important prerequisite for the issuance of a preliminary injunction…." *Faiveley Transp. Malmo AB v. Wabtec Corp.*, 559 F.3d 110, 118 (2d Cir. 2009) (internal quotations and citations omitted). Defendants argue that Paige's complaint fails with regard to all four factors. The Court agrees.

As discussed in the Court's analysis of standing above, the harms that Paige alleged are attenuated and highly speculative. Paige has proffered no actual

[2] The Court has determined that it lacks jurisdiction. Its analysis should stop at that point. In this instance, however, there are practical reasons to continue on. First, the Court has held an evidentiary hearing on the request for preliminary injunctive relief. Second, it is possible that an appeal may follow from a dismissal. Third, given the proximity of the election, in the event the Court's initial determination as to its jurisdiction was in error, a ruling as to the preliminary injunction, at least potentially, would permit review of the request for extraordinary relief in advance of the election.

evidence of the likelihood that error, omissions, or fraud would occur at all in the upcoming election and if so, whether the extent of such misdeeds would result in irreparable harm to Paige. At the hearing on October 3, 2022, Vermont's Director of Elections and Campaign Finance in the Vermont Secretary of State's Office, Will Senning, affirmed the assertions contained in his declaration. Exh. 3, Declaration of Will Senning in Support of Defendants' Opposition to Plaintiff's Motion for a Preliminary Injunction. According to Senning, Vermont's election procedures "provide robust protections to ensure the integrity, accuracy, and security of Vermont's elections," as confirmed by the post-election audits conducted after each general election since the 2014 general election.[3] Exh. 3, ¶¶ 5-6.

Of most import, Senning testified as to the 2020 election results, which were accomplished with a similar mail-in system. Following that election, the Secretary of State's Office identified a mere seven reported instances of voting irregularities. Of those, all but one were determined to stem from human or administrative error. *Id.*, ¶¶ 17-18. There was only a single "actionable case," where a voter purposely attempted to vote once by mail and, again, at the polls. *Id.*, ¶ 19.

Based on that experience, Senning averred that the Act 60 changes would not increase voter fraud or compromise the election security and integrity of Vermont elections. The Court finds that testimony persuasive. That evidence clearly weighs against any finding of irreparable harm.

[3] The Court acknowledges Paige's point that the audits themselves addressed only tabulation errors. Senning's testimony concerning the lack of fraud in Vermont's elections went beyond mere number crunching, however.

Additionally, Paige's delay in bringing the action belies the urgency of the asserted claim of harm. In 2021, the Legislature passed Act 60, which requires the Secretary of State to mail a general election ballot to all active voters on the statewide voter checklist. 2021, No. 60, § 7; 17 V.S.A. § 2537a(a). That statute, effective June 7, 2021, requires the mailing to "commence not later than 43 days before the election and [to] be completed not later than October 1." 17 V.S.A. § 2537a(a)(1). Because the 2022 election on November 8, the deadline for mailing ballots was September 26. Exh. 1, Senning Aff., ¶ 6.

Plaintiff filed his Complaint on July 26, 2022—more than a year after the Governor signed the changes into law on June 7, 2021. Paige's "failure to act sooner undercuts the sense of urgency that ordinarily accompanies a motion for preliminary relief and suggests that there is, in fact, no irreparable injury." *Tough Traveler, Ltd. v. Outbound Prod.*, 60 F.3d 964, 968 (2d Cir. 1995) (quoting *Citibank, N.A. v. Citytrust*, 756 F.2d 273, 277 (2d Cir. 1985)).[4]

As to Paige's likelihood of success on the merits, as discussed above, Paige lacks standing because his claims of harm are not personal and are entirely theoretical. He has also proffered no evidence that the harms of which he complains are at all likely to occur and, if they did occur, that they would not be redressable through post-election remedies or that they would alter the results of the election. His complaint is not likely to succeed on the merits.

[4] Further, to the extent an errors, omissions, or fraud occurs in the upcoming election, 17 V.S.A. § 2603 provides a robust post-election remedy at law to address them.

Lastly, the Court must consider both the "public interest," and "the effect on each party of the granting or withholding of the requested relief." *Taylor*, 2017 VT 92, ¶ 19, 205 Vt. 586, 596 (quoting *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008)). According to Senning, the temporary changes made to election procedures for the 2020 election, which included measures that have been made permanent, such as mailing ballots to each registered voter and using ballot collection boxes, "led to the largest voter participation in Vermont's history . . . ." Exh. 3, ¶8-10. The Legislature and the Executive considered such benefits and chose to enact Act 60, including the provisions Paige challenges.

The public interest favors allowing Defendant to follow the statutory framework that has been created by the Legislative Branch and approved by the Executive Branch. *See Texaco, Inc. v. Hughes*, 572 F. Supp. 1, 9 (D. Md. 1982); *see also Able v. United States*, 44 F.3d 128, 131 (2d Cir.1995) ("[G]overnmental policies implemented through legislation or regulations developed through presumptively reasoned democratic processes are entitled to a higher degree of deference and should not be enjoined lightly.") If the Court enjoins the use of ballot collection boxes, or requires the other changes to the election procedure sought by Plaintiff at this juncture, turnout may decrease, to the detriment of the goals set by Act 60 and of the public. *See Purcell v. Gonzalez*, 549 U.S. 1, 4–5 (2006).

In fact, Court action at this late stage could well sow confusion among candidates, state/town officials, and the electorate. The Supreme Court has specifically stated that: "Court orders affecting elections, especially conflicting

orders, can themselves result in voter confusion and consequent incentive to remain away from the polls. As an election draws closer, that risk will increase." Based on such fears, the United States Supreme Court "has repeatedly emphasized that lower federal courts should ordinarily not alter the election rules on the eve of an election." *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S. Ct. 1205, 1207 (2020) (citing *Purcell*, 549 U.S. 1; *Frank v. Walker*, 574 U.S. 929 (2014); *Veasey* v. *Perry*, 135 S.Ct. 9 (2014)).

The Court also finds persuasive Senning's testimony as to other practical and financial impacts that would flow from implementation of Paige's requests. The elimination of the provision allowing third parties to return ballots would upend longstanding Vermont law and require shut-ins and others to make potentially difficult alternative arrangements. Paige's registration requirement, as a logistical matter, could not be put in place this election cycle. Increased security at ballot boxes would be a cost born by the citizens of each town. Allowing the chance to alter mailed-in ballots up to election day would mean town officials could not begin to count ballots until after polls had closed, which would increase delay in providing election results and in the time volunteers would need devote to the process. Further, early ballots can begin to be counted on October 10, 2022. If the law were changed or enjoined thereafter, as Paige requests, some ballots may have been counted but still eligible for reconsideration. Such ballots would be in legal limbo if an injunction were issued.

Balanced against those significant harms to the public and the electoral process, Paige's assertions that his changes will do no harm, falls flat. As to his alleged harms, Paige provided no evidence beyond mere conjecture to show that the eleventh-hour changes he hopes to make to Vermont's election procedure would work in the public interest in a manner that outweighs the detriments noted above. On this record, the Court concludes the opposite is true.

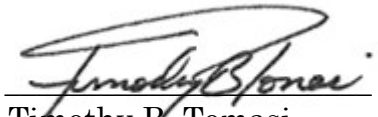
Accordingly, even if Paige had exhausted administrative remedies and had standing to pursue his claims, consideration of the factors governing injunctive relief show that a preliminary injunction should not issue.

Conclusion

The Court has no basis to question Plaintiff's high motives. Election security is vital to our democracy. The Legislature, however, has carefully crafted Act 60 with any eye both to increasing turnout and to maintaining security. Plaintiff has provided no legal basis to invoke the Court's jurisdiction to question the Legislature's balancing of those interests.

Defendants' Motion to Dismiss is *granted*.

Electronically signed on Friday, October 7, 2022, pursuant to V.R.E.F. 9(d).



Timothy B. Tomasi
Superior Court Judge