Note: In the case title, an asterisk (*) indicates an appellant and a double asterisk (**) indicates a cross-appellant. Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2020-280

APRIL TERM, 2021

H. Brooke Paige* v. State of Vermont & Secretary of State James Condos	}	APPEALED FROM:
	}	
	}	Superior Court, Orange Unit,
	}	Civil Division
	}	
	}	DOCKET NO. 20-CV-00307
		Trial Judge: Thomas A. Zonay

In the above-entitled cause, the Clerk will enter:

Plaintiff appeals pro se from the trial court's dismissal of his challenge to aspects of the Secretary of State's conduct of the 2020 election as reflected in the Secretary's election directive applicable only to the 2020 election, adopted pursuant to statutory authority conferred on the Secretary for the 2020 election only. We dismiss plaintiff's appeal as moot.

The record indicates the following. Plaintiff filed an election complaint with the Vermont Secretary of State pursuant to 17 V.S.A. § 2458 on July 1, 2020, complaining about recently enacted legislation (Act 135) and a proposal to mail ballots to registered voters to allow them to vote by mail. On July 31, 2020, plaintiff filed a complaint in the superior court seeking declaratory and injunctive relief. He acknowledged that the Secretary had not yet responded to his administrative complaint and that the Secretary had ninety days in which to do so.

Plaintiff is a voter and, at the time he filed his complaint, he was a candidate in the 2020 election. Plaintiff complained that the Secretary of State planned to mail ballots to all registered voters and allow third parties to help voters with their ballots. He argued that these plans violated Vermont's election laws. He asked the court to: declare that two laws enacted in 2020 only empowered the Secretary to conduct the 2020 general election by adopting rules and procedures consistent with existing election law; restrain the Secretary from implementing a mass-mailing program in the general election; and prohibit mailing of "live" ballots during the general election unless requested by registered voters following the procedures in Title 17, V.S.A.

Defendants opposed plaintiff's request for injunctive relief and moved to dismiss his complaint. They argued that the court lacked subject matter jurisdiction because plaintiff failed to exhaust his administrative remedies; plaintiff lacked standing to sue; and that the Secretary's actions were authorized by the legislature and consistent with Title 17.

In a September 8, 2020 decision, the court granted defendants' motion to dismiss. It declined to exercise its discretion to review this matter before plaintiff exhausted his administrative remedies. It found that the complaint's subject matter fell squarely within the expertise of the Office of the Vermont Secretary of State, and that that office should have the opportunity to respond to

plaintiff's complaint before the trial court considered the matter. The court also lacked a record to review given that plaintiff had prematurely filed his case. The court further concluded that plaintiff lacked standing because his allegations consisted of theoretical harms to the election process rather than threats of actual injury to a protected legal interest.

Following the court's decision, plaintiff moved to amend his complaint, asserting that the Secretary had issued a written determination of his complaint. He also moved for reconsideration, arguing that he had standing and noting that he was a candidate for office, not only a voter. The court denied his requests. It explained that because plaintiff's complaint had been dismissed, there was no longer a presumption in favor of allowing plaintiff to amend his complaint. See N. Sec. Ins. Co. v. Mitec Elecs., Ltd., 2008 VT 96, ¶ 44, 184 Vt. 303 (explaining that "the presumption that leave to amend shall be freely given pursuant to [V.R.C.P.] 15(a) disappears after judgment has been entered" (quotation omitted)). It added that the proposed amendment would also be futile given plaintiff's lack of standing. With respect to his motion for reconsideration, the court explained that it had already considered and rejected plaintiff's standing arguments. Insofar as he asserted that the fact that he was a candidate led to a different conclusion, the court concluded that plaintiff had not established a likelihood that his candidacy would be injured in the future. The court thus reaffirmed its determination that dismissal was the appropriate remedy. This appeal followed.

We dismiss this appeal as moot. As we have explained, "[a] case becomes moot—and this Court loses jurisdiction—when there no longer is an actual controversy or the litigants no longer have a legally cognizable interest in the outcome of the case." Paige v. State, 2017 VT 54, ¶ 7, 205 Vt. 287 (Paige II). "[E]ven if a case was not moot when it was first filed, intervening events since its filing can render it moot." Id. We conclude that there is no longer "an actual controversy" here.

In his complaint, plaintiff challenged the Secretary of State's "Elections Directive" that by its own terms applied only in 2020. The statutory authority for the Secretary of State's directive was based on statutory authority that was likewise limited. Act 192 stated in relevant part that "[i]n the year 2020, the Secretary of State is authorized . . . to order or permit, as applicable, appropriate elections procedures for the purpose of protecting the health, safety, and welfare of voters, elections workers, and candidates in carrying out elections." 2019, No. 92 (Adj. Sess.), § 3(a). The Act included a nonexclusive list of possible procedures that the Secretary could direct, including "requiring . . . town clerks to send ballots by mail to all registered voters." Id. The Legislature amended Act 92 with Act 135, which among other things, provided for procedures "[i]f the Secretary of State orders or permits the mailing of 2020 General Election ballots to all registered voters." 2019, No. 135 (Adj. Sess.), § 1.

The Secretary prepared a vote-by-mail process and issued a directive governing "Election Procedures for Statewide Elections in 2020." See Office of the Sec'y of State, First Statewide Elections Directive (July 20, 2020), https://sos.vermont.gov/media/hxgjjdkb/secretary-of-state-s-first-2020-statewide-election-procedures-directive.pdf [https://perma.cc/H28X-9XGM]. The directive provided that, for the November 2020 general election, "[a] ballot [would] be mailed to every active voter on the statewide voter checklist." Id. at 4. It also provided that, generally, candidates or their staff members could not return ballots with an exception for the return of their own ballots or ballots of "an immediate family member . . . who ha[d] requested their assistance." Id. at 1. The 2020 Elections Directive explicitly applied only to "Election Procedures for Statewide Elections in 2020," and specifically, "the August Statewide Primary and November General Election in the year 2020." Id.

By their terms, the laws authorizing the Secretary's actions and the Secretary's directive were temporary measures enacted to respond to the Covid-19 pandemic and the elections to which

they applied have concluded. See 2019, No. 92 (Adj. Sess.), § 1 ("[T]his act sets forth temporary elections provisions in response to COVID-19."). As stated above, the Court can decide only "actual controversies arising between adverse litigants." In re S.N., 2007 VT 47, ¶ 9, 181 Vt. 641 (mem.) (quotation omitted). The issues raised in plaintiff's complaint are no longer "live" and he "lack[s] a legally cognizable interest in the outcome." In re Hopkins Certificate of Compliance, 2020 VT 47, ¶ 16 (quotation omitted).

Plaintiff fails to show that any exception to the mootness doctrine applies. This case does not fall within the "narrow exception" for cases capable of repetition yet evading review. In re S.N., 2007 VT 47, ¶ 7. This exception applies when: (1) "the challenged action [is] in its duration too short to be fully litigated prior to its cessation or expiration"; and (2) "there [is] a reasonable expectation that the same complaining party will be subjected to the same action again." Paige v. State, 2013 VT 105, ¶ 10, 195 Vt. 302 (quotations omitted) (Paige I).

Assuming arguendo that plaintiff would have standing to bring his claim, he cannot satisfy the second prong of this test. Plaintiff asserts that the pandemic is likely to continue through 2022 and the Secretary will likely employ procedures similar to those used in the 2020 general election. This is far too speculative to show a "demonstrated probability" that plaintiff will again "become embroiled . . . in this same situation." Paige II, 2017 VT 54, ¶ 13 (quotation omitted). The fact that it may be "theoretically possible" does not suffice. Id. (quotation omitted). Plaintiff's suggestion that the Legislature might enact similar laws undercuts his mootness argument. Any future legislation must be challenged on its own terms; we cannot assume the new legislation will be the same as that enacted in 2020. See id. ¶ 14 ("A decision by this Court . . . cannot be based on mere speculation."); see also Paige I, 2013 VT 105, ¶ 11 (concluding that mootness exception did not apply because plaintiff's prediction of future events relied on speculation and, if the predicted events came to pass, "that situation would be a new and different event"). This is equally true of the pending legislation referenced by plaintiff in his supplemental filing. The fact that the Vermont Senate has passed a bill concerning voting-by-mail does not mean that the bill will be enacted into law, and any challenge to a new law will present a different question from whether the Secretary of State acted in conformity with a law applicable only to the 2020 election.

We are unpersuaded by the cases plaintiff cites in support of his position. Those cases involve challenges to laws that continued to apply after the elections in question had concluded. See, e.g., Moore v. Ogilvie, 394 U.S. 814, 816 (1969) (concluding that challenge to nomination process was not moot even though election was over because "the burden . . . allowed to be placed on the nomination of candidates for statewide offices remains and controls future elections, as long as Illinois maintains her present system as she has done since 1935" and "problem [was] therefore capable of repetition, yet evading review" (quotation omitted)).

Plaintiff appears to argue that his case is not moot because the Secretary of State through the Election Directive violated election laws that remain on the books. Plaintiff's theory appears to be that because, in plaintiff's view, the Secretary of State exceeded his statutory authority in the 2020 election cycle, there is a reasonable probability that he will do so again in the future. But the statutory authority on which the Secretary of State purported to rely in adopting the Election Directive in 2020 no longer exists. The suggestion that absent judicial intervention, there is a reasonable probability that the Secretary of State, without any purported statutory authority, will violate the statutes governing elections in Vermont, and will violate them in the same way, relies on multiple layers of speculation.

Plaintiff makes no specific argument concerning the "negative collateral consequences" exception to the mootness doctrine. He simply repeats his claim that the Secretary is acting

unlawfully and suggests that absent court intervention, the Secretary will do so again. "The so-called negative collateral consequences exception to the mootness doctrine is limited to situations where proceeding to a decision in an otherwise dead case is justified by a sufficient prospect that the decision will have an impact on the parties." Paige I, 2013 VT 105, ¶ 12 (quotations omitted). Plaintiff's concern that the Secretary will violate the law in the future is not a present negative collateral consequence warranting an exception to the mootness doctrine.

Finally, plaintiff points to recent opinions by Justice Thomas and Justice Alito dissenting from the U.S. Supreme Court's denial of certiorari review of a decision of the Pennsylvania Supreme Court extending the deadline for receipt of mail-in ballots in Pennsylvania in the November 2020 federal election. See Republican Party of Pa. v. Degraffenreid, 141 S. Ct. 732 (2021). Pointing to the very short window of time generally available to effectively challenge election-related actions and decisions, and the importance of establishing clear election rules well in advance of elections, these dissenting Justices argued that granting certiorari and deciding the legal question at the heart of the Pennsylvania appeal now, when there is not an impending election, would be far preferable to leaving important legal questions unanswered and risking confusion in future elections. We do not necessarily disagree with this general reasoning, but conclude that the appeal before us does not present the kind of broad and recurring issue identified by these dissenting justices. As Justice Alito wrote, the cases at issue presented "an important and recurring constitutional question: whether the Elections or Electors Clauses of the United States Constitution . . . are violated when a state court holds that a state constitutional provision overrides a state statute governing the manner in which a federal election is to be conducted." Id. at 738 (Alito, J., dissenting). This broad and recurring constitutional question that has apparently divided lower courts is not necessarily tied to the specific circumstances of the COVID-19 pandemic nor the specific details of the Pennsylvania Supreme Court decision for which certiorari review was sought. By contrast, the question at the heart of plaintiff's challenge is whether the Secretary of State exceeded his special authority pursuant to the special statute authorizing him to take certain actions in the context of the COVID-19 pandemic. The merits of this question are tied to a specific administrative action undertaken pursuant to a specific and time-limited statutory authorization. For that reason, the dissenting opinions cited by plaintiff are unpersuasive in this context.[*]

Appeal dismissed as moot.

BY THE COURT:

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Beth Robinson, Associate Justice

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Karen R. Carroll, Associate Justice

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William D. Cohen, Associate Justice

[*] Plaintiff raises several additional arguments in his supplemental filing, asserting that the case is not moot because James Condos is still the Vermont Secretary of State and because no post-election audit has been conducted. These arguments are beyond the scope of the permitted supplemental authority, and we do not address them.