State of New Hampshire
Supreme Court

NO. 2013-0043

2013 TERM

MAY SESSION

William L. O'Brien

v.

New Hampshire Democratic Party
and
Raymond C. Buckley, Chairman

RULE 7 APPEAL OF FINAL DECISION OF THE
HILLSBOROUGH COUNTY (NORTH) SUPERIOR COURT

OPPOSING BRIEF OF DEFENDANTS-APPELLEES,
NEW HAMPSHIRE DEMOCRATIC PARTY AND RAYMOND C. BUCKLEY

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Cases

New Hampshire Cases

Other States' Cases

New Hampshire Statutes

STATEMENT OF FACTS

I. New Hampshire's Robocall Statute

Shortly after the 2002 election, Representative Paul Spiess, member of the House from the towns of Amherst and Milford, learned from his constituents they had a "spontaneous visceral negative reaction" to electioneering by pre-recorded telephone calls. He said his "friends and neighbors confronted [him] repeatedly as they entered and left the polls complaining about these calls," and that "[t]hey were flat out annoyed." WRITTEN TESTIMONY OF REP. PAUL SPIESS, PRIME SPONSOR (Jan. 29, 2003), *Appx.*[1] at 56.

Representative Spiess agreed. He felt robocalls "interfered with my rights to privacy and the quite enjoyment of my home.... In almost every instance, I was unable to determine who made the recording, who paid for the message, and which political candidate (if any) they were endorsing." *Id.* He and his constituents do not like robocalls because, "they don't like the interruption implied by it, they don't like the means of communication," ORAL TESTIMONY OF REP. SPIESS (Apr. 23, 2003), *Appx.* at 81; WRITTEN TESTIMONY OF REP. PAUL SPIESS (Apr. 23, 2003), *Appx.* at 88, and don't like "pre-recorded messages sent out in mass by automatic dialing systems on a repetitive basis to individuals who are unaware who is behind the call." WRITTEN TESTIMONY OF REP. PAUL SPIESS, PRIME SPONSOR (Jan. 29, 2003), *Appx.* at 56. Other witnesses, including the bill's co-sponsors, echoed these comments. *See* HOUSE HEARING MINUTES, *Appx*. at 44 *et seq*.; HOUSE TESTIMONY, *Appx*. at 55 *et seq*.; SENATE COMMITTEE MINUTES, *Appx*. at 78 *et seq*.

[1]Because the appendix filed with the appellant's brief does not include all materials necessary for consideration of this appeal, a more comprehensive appendix is being filed herewith; all citations to the record are to it, designated simply as "*Appx*."

Representative Spiess would have liked to eliminate robocalls altogether:

> While I respect the right of freedom of speech, I believe that there is a counterbalancing right to privacy. If it were within my power, I would put an outright ban on all pre-recorded political messages.

WRITTEN TESTIMONY OF REP. PAUL SPIESS, PRIME SPONSOR (Jan. 29, 2003), *Appx.* at 56.

Accepting something less, Representative Spiess was the "prime sponsor" of what became RSA 664:14-a, reproduced in the margin,[2] and addended to this brief at page 29.

The statute defines robocalls, and requires they say within the first ½-minute the candidate or organization it is on behalf of, and who paid for the call. RSA 664:14-a, II(a) & (b). As originally proposed the bill would have required the caller tell a recipient how to get on the do-not-call-list,

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[2]RSA 664:14-a Prerecorded Political Messages. –

I. In this section, "prerecorded political message" means a prerecorded audio message delivered by telephone by:

(a) A candidate or political committee; or

(b) Any person when the content of the message expressly or implicitly advocates the success or defeat of any party, measure, or person at any election, or contains information about any candidate or party.

II. No person shall deliver or knowingly cause to be delivered a prerecorded political message unless the message contains, or a live operator provides, within the first 30 seconds of the message, the following information:

(a) The name of the candidate or of any organization or organizations the person is calling on behalf of.

(b) The name of the person or organization paying for the delivery of the message and the name of the fiscal agent, if applicable.

III. No person shall deliver or knowingly cause to be delivered a prerecorded political message to any telephone number on any federal do not call list.

IV. (a) A violation of this section shall result in a civil penalty of $5,000 per violation.

(b) Any person injured by another's violation of this section may bring an action for damages and for such equitable relief, including an injunction, as the court deems necessary and proper. If the court finds for the plaintiff, recovery shall be in the amount of actual damages or $1,000, whichever is greater. If the court finds that the act or practice was a willful or knowing violation of this section, it shall award as much as 3 times, but not less than 2 times, such amount. In addition, a prevailing plaintiff shall be awarded the costs of the suit and reasonable attorney's fees, as determined by the court. Any attempted waiver of the right to the damages set forth in this paragraph shall be void and unenforceable. Injunctive relief shall be available to private individuals under this section without bond, subject to the discretion of the court. Upon commencement of any action brought under this section, the clerk of the court shall mail a copy of the complaint or other initial pleadings to the attorney general and, upon entry of any judgment or decree in the action, shall mail a copy of such judgment or decree to the attorney general.

but as enacted it only prohibited callers from dialing numbers on the federal list. *Compare* HB332-FN § II(d) (as introduced), *Appx.* at 34 *with* RSA 664:14-a, III. The Legislature debated what types of parties might be reachable by the new law. COMMITTEE MINUTES (Apr. 23, 2003), *Appx.* at 83 (Statement of Senator Clifton Below, Senate Sponsor). Violations may result in a $5,000 civil penalty, and between $1,000 and $3,000 liability to "any person injured by another's violation of this section" depending upon the level of wilfulness. Courts have injunction authority, and may award fees and costs. RSA 664:14-a, IV.

The measure was widely supported, ROLL CALL, HOUSE ELECTION LAW COMMITTEE (Mar. 18, 2003), *Appx.* at 61, ELECTION LAW COMMITTEE RPT. (Mar. 18, 2003), *Appx.* at 65; SENATE JOURNAL (June 24, 2003), *Appx.* 95-96, including by the defendant here and then-Representative Raymond Buckley. ROLL CALL, HOUSE ELECTION LAW COMMITTEE (Mar. 18, 2003), *Appx.* at 60-61 ("committee vote: 16-2"); INTERVIEW OF BUCKLEY BY AG INVESTIGATOR (Aug. 10, 2011), *Appx.* at 171. It became effective January 1, 2004.

II. 2010 District 4 Primary, O'Brien's Postcard, and Buckley's Robocall

Skipping ahead a few years, Hillsborough County District 4 is represented by four representatives to the House.[3] "Each party held a primary in September, with the top four finishers appearing on the November general election ballot." ORDER (Dec. 21, 2012), *Appx.* at 205.

In the September 2010 primary on the Republican ticket, there were five people running for the four seats. In the Democratic primary, there were just three seeking the same four. *Id.* The primary was on Tuesday, September 14.

On Monday September 13 voters received postcards from incumbent Republican Representative O'Brien, asking them to write-in his name on the Democratic ticket. INTERVIEW OF BUCKLEY BY AG INVESTIGATOR (Aug. 10, 2011), *Appx.* at 162. The purpose was, even if Mr. O'Brien failed to get on the November ballot as a Republican, his name would get in the fourth slot as a Democrat; or even more advantageous, on both tickets. DEFENDANT BUCKLEY'S MOTION FOR SUMMARY JUDGMENT AND AFFIDAVIT WITH CERTIFIED COPIES (July 9, 2012), *Appx.* at 117. Because the postcards did not disclose Mr. O'Brien was both a Republican and an incumbent member of the House, Democrats considered it misleading. INTERVIEW OF BUCKLEY BY AG INVESTIGATOR (Aug. 10, 2011), *Appx.* at 165-66.

On Monday, Ray Buckley, Chair of the Democratic Party, heard about the last-minute postcards. He directed his staff to come up with a script:

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[3] Hillsborough District 4 is comprised of the towns of Lyndeborough, Mont Vernon, New Boston, Temple, and Wilton. SECRETARY OF STATE'S OFFICIAL RESULTS FROM 2010 STATE PRIMARY ELECTION FOR STATE REPRESENTATIVE - HILLSBOROUGH COUNTY DISTRICT NO. 4 (Apr. 9, 2012), *Appx.* at 143; SECRETARY OF STATE'S OFFICIAL RESULTS FROM 2010 GENERAL ELECTION FOR STATE REPRESENTATIVE - HILLSBOROUGH COUNTY DISTRICT NO. 4 (Apr. 9, 2012), *Appx.* at 145.

> This is State Democratic Chair Ray Buckley calling with the important news that current Republican Bill O'Brien has asked to join the Democratic Party's ticket for the November elections.
>
> If he succeeds tomorrow, we expect Bill O'Brien will embrace the Democratic Party's platform, support President Barack Obama, national health care reform and stand up for gay marriage, and protect a woman's right to choose and our agenda to move NH and America forward.
>
> Once again, we wanted you to know before you vote tomorrow that Bill O'Brien has asked to join the Democratic ticket and our progressive agenda. Thank you so much.

EMAIL FROM RAY BUCKLEY TO VARIOUS (Sept. 13, 2010, 10:53PM), *Appx.* at 172; INTERVIEW OF BUCKLEY BY AG INVESTIGATOR (Aug. 10, 2011), *Appx.* at 166-67.

Mr. Buckley recorded the script over the phone to his usual robocall shop in New York, PLAINTIFF'S SECOND SET OF REQUESTS FOR ADMISSION PURSUANT TO SUPERIOR COURT RULE 54 ¶¶ 4, 5 (June 6, 2012), *Appx.* at 104; DEFENDANT RAYMOND C. BUCKLEY'S ANSWER TO PLAINTIFF'S SECOND SET OF REQUESTS FOR ADMISSION PURSUANT TO SUPERIOR COURT RULE 54 ¶¶ 4, 5 (June 29, 2012), *Appx.* at 108, expecting from experience they would add a standard paid-for-by tag-line. INTERVIEW OF BUCKLEY BY AG INVESTIGATOR (Aug. 10, 2011), *Appx.* at 164. Perhaps because it is unusual for robocalls to feature the party chair, or because who paid was apparent from the body of the message, the tag-line was not added. *Id.* at 164, 167, 171.

Mr. Buckley had hoped to get the robocalls out in mid-afternoon because he considers that the best time, *id*. at 162, but the calls were not made until between 3:00PM and 4:30PM. *Id.* at 168. For a price of $100, 456 calls were attempted to registered Republicans; 62 were unsuccessful and 394 households were reached. INVOICE, BROADCAST SOLUTIONS (Oct. 1, 2010), *Appx.* at 174; DEFENDANT BUCKLEY'S MOTION FOR SUMMARY JUDGMENT AND AFFIDAVIT WITH CERTIFIED COPIES (July 9, 2012), *Appx.* at 116; CONSENT AGREEMENT (Aug. 29, 2011), *Appx.* at 177.

That evening, by email Mr. Buckley distributed to his usual information-dissemination

network the script of the robocall, which shortly appeared on known partisan websites. EMAIL FROM RAY BUCKLEY TO VARIOUS (Sept. 13, 2010, 10:53PM), *Appx.* at 172; INTERVIEW OF BUCKLEY BY AG INVESTIGATOR (Aug. 10, 2011), *Appx.* at 165, 169-70.

One known person, Sandra Kent, not a plaintiff, received one of the calls. Although she was confused by its context and the situation, she "recall[ed] that the message claimed something about the State Democratic Party." AFFIDAVIT OF SANDRA KENT (Aug. 6, 2012), *Appx.* at 181-82. She understood "the message was from the Democrats speaking against [Mr.] O'Brien." AG ELECTION COMPLAINT INVESTIG. RPT. (Aug. 10, 2011), *Appx.* at 187-88. Ms. Kent did not say whether she voted for Mr. O'Brien in either the primary or general election. *Id.*; AFFIDAVIT OF SANDRA KENT (Aug. 6, 2012), *Appx.* at 181-82. A second person who received one of the calls, also not a plaintiff, could not remember its details, and also did not say whether she voted for or against Mr. O'Brien. AG ELECTION COMPLAINT INVESTIG. RPT. (Aug. 10, 2011), *Appx.* at 188.

In the next-day's voting, Mr. O'Brien got the greatest number of votes in the Republican primary, but did not get on the Democratic ticket. SECRETARY OF STATE'S OFFICIAL RESULTS FROM 2010 STATE PRIMARY ELECTION FOR STATE REPRESENTATIVE - HILLSBOROUGH COUNTY DISTRICT NO. 4 (Apr. 9, 2012), *Appx.* at 143. In the November general election, all four Republicans won, with Mr. O'Brien winning the greatest number of votes, and in that term Mr. O'Brien went on to become Speaker of the House. SECRETARY OF STATE'S OFFICIAL RESULTS FROM 2010 GENERAL ELECTION FOR STATE REPRESENTATIVE - HILLSBOROUGH COUNTY DISTRICT NO. 4 (Apr. 9, 2012), *Appx.* at 145; ORDER (Dec. 21, 2012), *Appx*. at 206-07; DECLARATION ¶ 6 (Sept. 9, 2011), *Appx.* at 2.

STATEMENT OF THE CASE

It was alleged that Mr. Buckley and the Democratic Party violated the robocall statute by failing to say on whose behalf the messages were delivered and who paid for them – charges they deny. AFFIDAVIT OF RAYMOND C. BUCKLEY (Sept. 6, 2012), *Appx.* at 198. PLAINTIFF'S SECOND SET OF REQUESTS FOR ADMISSION PURSUANT TO SUPERIOR COURT RULE 54 ¶¶ 7-9 (June 6, 2012), *Appx.* at 104; DEFENDANT RAYMOND C. BUCKLEY'S ANSWER TO PLAINTIFF'S SECOND SET OF REQUESTS FOR ADMISSION PURSUANT TO SUPERIOR COURT RULE 54 ¶¶ 7-9 (June 29, 2012), *Appx.* at 108. In August 2011, the Democratic Party entered a consent agreement with the Attorney General "to resolve the State's claims for an alleged violation of the … statute, and … not an admission of any violation," and paid a $5,000 fine. CONSENT AGREEMENT (Aug. 29, 2011), *Appx.* at 177, 179.

The following week, Representative O'Brien sued both the New Hampshire Democratic Party[4] and its Chairman Ray Buckley, claiming liquidated damages of $1,182,000, which it calculated by multiplying 394 calls times $1,000 trebled. DECLARATION (Sept. 9, 2011), *Appx.* at 1, 5.

In a request for admissions, Representative O'Brien put the legislative history into the record, as reproduced in the appendix accompanying this brief, to which Mr. Buckley and the Democratic Party initially objected. PLAINTIFF'S FIRST REQUEST FOR ADMISSION UNDER RULE 54 (Feb. 10, 2012), *Appx.* at 30; LEGISLATIVE HISTORY OF 2003 HOUSE BILL 332, *Appx.* at 32-98; DEFENDANT BUCKLEY'S OBJECTION TO PLAINTIFF'S FIRST REQUEST FOR ADMISSION UNDER RULE 54 (Mar. 1, 2012), *Appx. at* 99.

The parties filed cross-motions for summary judgment on a number of issues. The

[4]Throughout his brief, Representative O'Brien has misnamed the New Hampshire Democratic party, and even on its cover appears to make an attempt to alter the caption of the case, without regard to this Court's rules regarding parties' designations. SUP.CT.R. 28.

Democratic Party and Chairman Buckley argued that Representative O'Brien had no standing to sue because he is not "any person injured by another's violation of this section." DEFENDANT BUCKLEY'S MOTION FOR SUMMARY JUDGMENT AND AFFIDAVIT WITH CERTIFIED COPIES (July 9, 2012), *Appx.* at 116; DEFENDANT RAYMOND BUCKLEY'S OBJECTION TO PLAINTIFF WILLIAM L. O'BRIEN'S CROSS-MOTION FOR SUMMARY JUDGMENT TOGETHER WITH SUPPORTING AFFIDAVIT (Sept. 6, 2012), *Appx.* at 194; DEFENDANT NEW HAMPSHIRE DEMOCRATIC PARTY'S OBJECTION TO PLAINTIFFS CROSS-MOTION FOR SUMMARY JUDGMENT (Sept. 7, 2012), *Appx.* at 199.

Representative O'Brien claimed the statute benefits him, on similar grounds he advances on appeal. PLAINTIFF'S MEMORANDUM OF LAW IN SUPPORT OF HIS OBJECTION TO THE DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND HIS CROSS-MOTION FOR SUMMARY JUDGMENT ON LIABILITY (Aug. 7, 2012), *Appx.* at 149; REPLY TO DEFENDANTS' OBJECTION TO THE PLAINTIFF'S CROSS-MOTION FOR SUMMARY JUDGMENT (Sept. 17, 2012), *Appx.* at 201.

The Hillsborough County (North) Superior Court (*David A. Garfunkel*, J.) held that "any person injured" may be broadly construed, based on construction of the Consumer Protection Statute with similar language: "Read in this context, a person mentioned in the prerecorded message could be considered an injured party, and thus have standing to sue." ORDER (Dec. 21, 2012), *Appx.* at 209.

> On the other hand, prerecorded political messages are delivered by telephone, which presupposes only two parties: the person delivering the message, and the person receiving the message. The statute does not mention persons who are the subject matter of the phone call and places conditions only upon the person delivering the message. The statute also prohibits persons from knowingly delivering such messages to any telephone number on the "Do Not Call" list. This suggests the statute was designed to protect only the persons receiving the phone call, the potential voters. Accordingly, the court finds the language of the statute is ambiguous and will look to the legislative history to aid its analysis.

Id. at 209-210 (citation omitted). Quoting Representative Spiess, the prime sponsor of the bill that became RSA 664:14-a, the court then held:

> Against this backdrop, it is clear the statute was designed to protect the privacy of persons receiving these automated phone calls, not persons mentioned in the phone message. Accordingly, because the plaintiff has not alleged that he received a phone call from the defendants, he lacks standing to assert a cause of action.

Id. at 210-11. Treating the request for summary judgment as a motion to dismiss for lack of subject-matter jurisdiction, the court dismissed the suit. *Id.* at 211. Representative O'Brien appealed.

SUMMARY OF ARGUMENT

The New Hampshire Democratic Party, and Raymond Buckley its Chairman, point out that the purpose of the 2003 robocalling disclosure statute is to inform recipients of the calls, and not to protect against electioneering. They show Representative O'Brien was injured by neither the robocalls nor their allegedly unattributed nature, and therefore can prove neither standing nor liability. They note that legislatures in New Hampshire and elsewhere have named candidates in election laws when they mean to give candidates standing, a significant omission here. After rebutting Representative O'Brien's subsidiary suggestions and supporting the lower court's citation of legislative history, they show their robocall complied with the statute.

ARGUMENT

I. Campaign Truthiness

The design of New Hampshire's "political advertising" statute, RSA 664:14-a, is apparent on its face. It is a disclosure statute, requiring robocalls say who they are pitching and who paid for them. It is a privacy statute, mandating robocallers refrain from dialing those on the do-not-call-list. It is an open-elections statute, encouraging campaigns from the darkness of anonymity.

Despite its sponsor's ideal, it does not ban robocalls. It is not a speech regulation guarding against electioneering attacks. It is not a defamation action protecting the reputation of candidates. It does not make the court into an arbiter of misleading claims and campaign truth.

"The general rule for standing is that a party may bring suit when the party has suffered a legal injury against which the law was designed to protect." *Billewicz v. Ransmeier*, 161 N.H. 145, 149 (2010) (quotations omitted); *Roberts v. Gen. Motors Corp*., 138 N.H. 532, 535 (1994) ("In evaluating whether a party has standing to sue, we focus on whether the plaintiff suffered a legal injury against which the law was designed to protect.").

The plaintiff bears the burden of proving standing. *Avery v. New Hampshire Dep't of Educ*., 162 N.H. 604, 606 (2011). A jurisdictional challenge based upon lack of standing is reviewed by this Court *de novo*. *Baer v. New Hampshire Dep't of Educ.*, 160 N.H. 727, 729 (2010).

II. Neither Injury nor Causation

The standing clause of the statute provides: "Any person injured by another's violation of this section may bring an action." RSA 664:14-a, IV(b). Thus to prove standing, Mr. O'Brien must show he is: 1) a person, 2) injured, 3) "by," 4) the robocaller's failure to disclose.

Here Mr. O'Brien has not and cannot show he has been injured. The most harm he has claimed for himself is that the robocall "was inherently misleading and deceptive, and was aimed at Mr. O'Brien personally." REPLY TO DEFENDANTS' OBJECTION TO THE PLAINTIFF'S CROSS-MOTION FOR SUMMARY JUDGMENT (Sept. 17, 2012), *Appx.* at 201. To the extent that is so, Mr. O'Brien is a politician, who by the act of running for office has held himself out for personal, misleading, and deceptive attacks. *Garrison v. Louisiana*, 379 U.S. 64, 73 (1964) (otherwise "it becomes a hazardous matter to speak out against a popular politician, with the result that the dishonest and incompetent will be shielded"); *Costello v. Capital Cities Communications, Inc.*, 532 N.E.2d 790 (Ill. 1988). Although it would not matter, Mr. O'Brien has not even alleged the robocalls cost him a vote. *Tatur v. Solsrud*, 498 N.W.2d 232, 234 (Wis. 1993) ("[A] statement which is not libelous on its face is not made so by the fact that the statement causes some people to vote against the plaintiff.").

Injury from unattributed robocalls, if any, are borne by the recipients. From the call itself, their privacy was interrupted. From the alleged lack of disclosure, they had feelings of being less than statutorily informed, and possibly missing an opportunity to check on the source of the call. Mr. O'Brien agrees. He claims: "My constituents were not able to know that what was being said about me was untrue because the call was made and paid for by the Democratic Party." ANSWER TO INTERROGATORIES ¶ 6 (undated), *Appx.* at 3. In his brief he says his "Republican primary voters [were] duped." O'BRIEN BRF. at 21. The only evidence offered of injury is the affidavit of Sandra Kent, who was the source of Mr. O'Brien's knowledge of the robocalls, and who at most swore she was confused and unsure whether to

believe it. She did not say it changed her vote. AFFIDAVIT OF SANDRA KENT (Aug. 6, 2012), *Appx. at* 181; *see also* AG ELECTION COMPLAINT INVESTIG. RPT. (Aug. 10, 2011), *Appx.* at 188 (reporting interview with second robocall recipient).

Even if these alleged injuries were sufficient to state a claim, Mr. O'Brien did not show causation – that the injury was caused "by" the robocaller's failure to disclose. The closest he can come to showing injury involves that of the recipient, not Mr. O'Brien. He alleges: "Failure to clearly identify the actual source of message (i.e., who was responsible for paying for it), compounded the deceptiveness of the message, *because actual recipients* of the defendant's robo-calls were confused about both the meaning of the call and who was behind it." REPLY TO DEFENDANTS' OBJECTION TO THE PLAINTIFF'S CROSS-MOTION FOR SUMMARY JUDGMENT ¶¶ 4, 6 (Sept. 17, 2012), *Appx. at* 201 (emphasis added).

Harming an opposing candidate's chances to gain office is the whole point of electioneering, but it is possible the calls helped him by solidifying votes of those who disagree with the Democratic Party's platform. Whether the allegedly *un-attributed* nature of the calls – the injury against which the law was designed to protect – harmed or helped also cannot be known.

The failure to prove causation is critical because standing requires it. RSA 664:14-a, IV(b) ("Any person injured *by* another's violation of this section may bring an action.") (emphasis added).

Without proof of either injury or causation, under the bare terms of the statute, Mr. O'Brien lacks standing to maintain this lawsuit and the lower court's dismissal should be affirmed.

III. Candidates do not Have Standing to Sue for Robocall Violations

In *Roberts v. General Motors Corp.*, 138 N.H. 532 (1994), the plaintiff made the identical claim Mr. O'Brien makes here, which this Court rejected. There:

> The statute convey[ed] standing upon "*any person who is injured* in his business or property by a violation of this chapter." According to the parties' arguments, this provision is susceptible to two very different interpretations. The plaintiff argues that the statute on its face provides a remedy to "any person" injured, and thus must be broadly construed. [The defendant] counters that the statute must be read as a whole, and more particularly that the provisions upon which the plaintiff bases his claims, are clearly designed not to protect the plaintiff, but rather to protect [others] from oppressive conduct.
>
> We find [the defendant's] argument to be more persuasive. While we agree with the plaintiff that the legislature's use of the word "any" generally evidences that a statute should include a broad array of potential plaintiffs, here the legislature specifically limited standing to those injured in business or property. Thus, it is a person's "business or property" interest that the statute seeks to protect.

General Motors, 138 N.H. at 536 (emphasis added, citations omitted).

Moreover, because election law is entirely statutory, and because claims of electoral injury are often merely those of the public electorate as a whole, election law standing provisions are carefully construed. *See e.g.*, *Babiarz v. Town of Grafton*, 155 N.H. 757, 759 (2007) (standing denied because statute did not broadly "say that any candidate, voter or taxpayer may appeal") (distinguishing other states' law where such parties specifically named).

This is different from consumer protection laws, which seek to broadly address consumers' often inadequate remedies against unethical vendors. *See LaChance v. U.S. Smokeless Tobacco Co.*, 156 N.H. 88 (2007)*; Eastern Mountain Platform Tennis, Inc. v. Sherwin-Williams Co., Inc.*, 40 F.3d 492 (1st Cir. 1994). It is also different from third-party standing situations where there is a fiduciary or beneficial relationship between the party with statutory standing and the party dependent upon it. *See e.g.*, *Minuteman, LLC v. Microsoft Corp.*, 147 N.H. 634 (2002) (denying third-party standing where antitrust statute gave standing to "[a]ny person threatened with injury or damage to his business or property by reason of a violation of

this chapter"); *Joyce v. Town of Weare*, 156 N.H. 526, 529 (2007) ("Contract vendees can have standing to appeal planning board decisions because, theoretically, it is the vendor's rights which are being determined."); *Green v. Foster*, 104 N.H. 287 (1962) ("The general rule is that an aggrieved person … is one who has a direct pecuniary interest in the estate of the alleged testator which will be defeated or impaired if the instrument in question is held to be a valid will.").

Had the legislature intended to give to candidates standing to sue for damage by robocall, it would have said so. For example, losing candidates may appeal to the Ballot Law Commission for recounts. RSA 665:8, II ("any candidate who … did not have the greatest number of votes may … appeal therefrom to the ballot law commission"). *See also, Friends of Joe Sam Queen v. Ralph Hise for NC Senate*, 735 S.E.2d 229 (N.C. App. 2012) (North Carolina law explicitly "gives a candidate for an elective office a cause of action" when an "advertisement for that elective office violates the … disclosure requirements."). In New Hampshire the remedy for a *candidate* is to file a complaint with the Attorney General, which is generally empowered to enforce the election laws, RSA 664:18 ("Any candidate or voter may make complaint in writing to the attorney general of any violation of any of the provisions of this chapter."), which is what occurred here.

Representative O'Brien seeks to minimize the injury and causation requirements in New Hampshire's robocalling statute, claiming he is a proper plaintiff merely because he is "any person." That construes the statute far too broadly, and accordingly, his suit should remain dismissed.

IV. Rebutting Mr. O'Brien's Subsidiary Arguments

Mr. O'Brien makes a number of other arguments, some based in the language of the statute and some not, which he says support his view of candidate standing. None of them, however, provide the comfort he claims.

Mr. O'Brien makes the erroneous claim that the robocall statute is designed to "protect the subject matter of the message." O'BRIEN BRF. at 21. This is contrary to the language of the statute, which is not intended to enforce veracity or protect reputation, but only requires disclosure.

Mr. O'Brien denies the relevance of the do-not-call-list, saying because it "involves a completely different type of violation and injury" than robocalling, "it is not informative" for standing. O'BRIEN BRF. at 21. He misses the point. The inclusion of the do-not-call-list betrays the statute's purpose to protect recipients of unwanted calls.

Mr. O'Brien goes so far as to suggest that a person who learns about a robocall from the actual recipient should also have standing because "the person receiving the message second-hand or third-hand is more impacted than the recipient," and thus "more likely to bring an action … which would further the statutory objective." O'BRIEN BRF. at 23. Nothing in the statute supports this claim, and it would seem that the impact of non-disclosure would diminish, not escalate, with each retelling. Moreover, under that theory, second- and third-hand hearsay would qualify a person as a plaintiff.

Mr. O'Brien appears to advance an equal protection violation based on the hearsay, in that it is "arbitrary and capricious" to treat those who personally took the call differently from those who heard about it second- or third-hand. O'BRIEN BRF. at 23. Not only is a constitutional issue un-preserved, but it is apparent that the original recipient and a later hearsay bystander are not similarly situated.

Finally, Mr. O'Brien advocates the aggregation of hundreds of robocalls into a single large damage award for technical violations of a disclosure statute, where the legislature did not name

candidates as plaintiffs. That has the effect of enriching a candidate at the expense of his opponent, and does nothing to address the injury suffered by the recipients of the allegedly defective calls. O'BRIEN BRF. at 24. The harm is to the callee, not the candidate, however, and the aggregate award Mr. O'Brien seeks cannot be squared with either the intent or language of the law.

The court below understood the statute "presupposes only two parties: the person delivering the message, and the person receiving the message," ORDER (Dec. 21, 2012), *Appx*. at 209, and that therefore the candidate is a standing stranger. Accordingly, this Court should affirm.

V. Appropriate Use of Legislative History

In his brief Mr. O'Brien contests the court's use of legislative history. O'BRIEN BRF. at 25-30. It was Mr. O'Brien who first offered the legislative history into the record, over the objection of Mr. Buckley and the Democratic Party. PLAINTIFF'S FIRST REQUEST FOR ADMISSION UNDER RULE 54 (Feb. 10, 2012), *Appx. at* 30; DEFENDANT BUCKLEY'S OBJECTION TO PLAINTIFF'S FIRST REQUEST FOR ADMISSION UNDER RULE 54 (Mar. 1, 2012), *Appx. at* 99. He is thus barred from reversing position now. *Cohoon v. IDM Software, Inc.*, 153 N.H. 1, 4 (2005) ("[T]he doctrine of judicial estoppel" applies where "the party's later position is clearly inconsistent with its earlier position.").

The purpose of the statute, and its grant of standing to robocall recipients only, is plain on its face. To the extent there is statutory ambiguity, legislative history is useful and allowable. *State Employees' Ass'n of New Hampshire, Inc., SEIU Local 1984 v. State*, 161 N.H. 558, 561 (2011) ("When statutory language is ambiguous … we will consider legislative history and examine the statute's overall objective."). Moreover the history, including the quotations of its prime sponsor, soundly support the lower court's ruling. Accordingly, the court was within its authority to consult the legislative record.

VI. Neither Raymond Buckley nor the Democratic Party Violated the Robocall Statute

The robocalling statute mandates that within the first ½-minute the call disclose the candidate or organization it is on behalf of, and who paid for it. RSA 664:14-a, II(a) & (b) (requiring disclosure of "[t]he name of the candidate or of any organization or organizations the person is calling on behalf of" and "[t]he name of the person or organization paying for the delivery of the message and the name of the fiscal agent, if applicable.").

The robocall here did both. It said:

> This is State Democratic Chair Ray Buckley calling with the important news that current Republican Bill O'Brien has asked to join the Democratic Party's ticket for the November elections.
>
> If he succeeds tomorrow, we expect Bill O'Brien will embrace the Democratic Party's platform, support President Barack Obama, national health care reform and stand up for gay marriage, and protect a woman's right to choose and our agenda to move NH and America forward.
>
> Once again, we wanted you to know before you vote tomorrow that Bill O'Brien has asked to join the Democratic ticket and our progressive agenda. Thank you so much.

EMAIL FROM RAY BUCKLEY TO VARIOUS (Sept. 13, 2010, 10:53PM), *Appx.* at 172.

The robocall made clear the name of the organization it was on behalf of, and who paid.

The message says: "This is State Democratic Chair Ray Buckley." It makes clear "we" expect Mr. O'Brien to "embrace the Democratic Party's platform" and "our" agenda.

Although the message inadvertently missed a separate tag-line, it made no effort to hide the identity of the speaker or his organization. Although the call did not explicitly say "paid for by," it is unmistakable to any listener the message was from the Democratic party and funded by it.

By listing perhaps the three most contentious issues of the past decade and maybe of a generation – Obama-care, gay marriage, and abortion – only a political ostrich could be unaware which party was promoting it.

Accordingly, Mr. Buckley and the Democratic Party denied any violation. "I absolutely dispute that my conduct violated the requirements of RSA 664:14-a. I fully complied with the requirements of RSA 664:14-a." AFFIDAVIT OF RAYMOND C. BUCKLEY (Sept. 6, 2012), *Appx.* at 198. The Democratic Party paid a civil penalty to "resolve the State's claims for an alleged violation" but made no admission. CONSENT AGREEMENT (Aug. 29, 2011), *Appx.* at 177.

Thus, even if Representative O'Brien has standing and can prove causation, neither Mr. Buckley nor the Democratic Party are liable.

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of the court below.

Respectfully submitted,

Raymond C. Buckley and the
New Hampshire Democratic Party
By their Attorney,

Law Office of Joshua L. Gordon

Dated: April 22, 2013

Joshua L. Gordon, Esq.
NH Bar ID No. 9046
75 South Main Street #7
Concord, NH 03301
(603) 226-4225

REQUEST FOR ORAL ARGUMENT AND CERTIFICATION

Raymond C. Buckley and the New Hampshire Democratic Party request that Attorney Joshua L. Gordon be allowed 15 minutes for oral argument because the robocall statute has not before been construed, the issue is novel, and it is important to future elections in New Hampshire.

I hereby certify that on April 22, 2013, copies of the foregoing will be forwarded to Edward C. Mosca, Esq.

Dated: April 22, 2013

Joshua L. Gordon, Esq.

ADDENDUM

STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS.
NORTHERN DISTRICT

SUPERIOR COURT

William L. O'Brien

v.

New Hampshire Democratic Party
Raymond C. Buckley

No. 11-C-786

ORDER

Plaintiff's writ in this case contains a single cause of action alleging a violation of RSA 664:14-a, Prerecorded Political Messages. Presently before the court are defendant Buckley's motion for summary judgment[1] and the plaintiff's cross-motion. The court held a hearing on October 25, 2012. After consideration of the pleadings and applicable law, the court finds and rules as follows.

Background

The following facts are undisputed.[2] Plaintiff William O'Brien is a New Hampshire State Representative who represents Hillsborough County District No. 4. Mr. O'Brien is a member of the Republican Party who is the former Speaker of the House.

In 2010, Mr. O'Brien ran for reelection. District 4 had four seats in the New Hampshire Legislature. Each party held a primary in September, with the top four finishers appearing on the November general election ballot.

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[1] While the New Hampshire Democratic Party did not specifically join in Buckley's motion, at oral argument it expressed its agreement with that motion.
[2] The facts are drawn from the parties' pleadings and accompanying exhibits.

There were five republican candidates in the Republican Party primary who were running for four seats. The Democratic Party primary featured three democratic candidates for four seats. Thus, Mr. O'Brien requested "[d]emocratic write-in votes in the September 14, 2010, primary so that he could appear on the ballot in the November cycle for elections as both (R)epublican and (D)emocrat." (Writ ¶ 7.)

Defendant Raymond Buckley is the Chairman of the co-defendant New Hampshire Democratic Party. The plaintiff alleges that on September 13, 2010, the day before the primary, the defendants caused a prerecorded political audio message to be delivered to 394 households. The message stated:

> This is State Democratic Chair Ray Buckley calling with the important news that current Republican Bill O'Brien has asked to join the Democratic Party's ticket for the November elections.
>
> If he succeeds tomorrow, we expect Bill O'Brien will embrace the Democratic Party's platform, support President Obama, national health care reform and stand up for gay marriage, and protect a woman's right to choose and our agenda to move New Hampshire and America forward.
>
> Once again, we wanted you to know before you vote tomorrow that Bill O'Brien has asked to join the Democratic ticket and our progressive agenda. Thank you so much.

(Def.'s Mot. Summ. J. ¶ 4.) The message did not contain the name of the person or organization paying for the delivery of the message or name of any fiscal agent.

Mr. O'Brien won a nomination to the general election ballot in the Republican Party primary. In doing so, he received the highest total number of votes in the race. He did not win a nomination to the general election ballot in the

Democratic Party primary. Thereafter, in November, Mr. O'Brien won the general election.

On September 12, 2011, Mr. O'Brien filed the present action under RSA 664:14-a, seeking $1,182.000.00 in damages. Thereafter on July 10, 2012, defendant Buckley moved for summary judgment, arguing, *inter alia*, that the plaintiff lacks standing. The plaintiff filed a cross-motion for summary judgment, contending he is an injured party and there is no genuine issue of material fact that the defendants violated the statute. The court considers each argument in turn.

Standard of Review

The court decides "summary judgment rulings by considering the affidavits and other evidence in the light most favorable to the non-moving party." Mbahaba v. Morgan, 163 N.H. 561, 568 (2012) (citation omitted). "If this review does not reveal any genuine issues of material fact, i.e., facts that would affect the outcome of the litigation, and if the moving party is entitled to judgment as a matter of law" then summary judgment is proper. Id.; see also RSA 491:8-a, III (2010). Here, the facts of the case are undisputed, and the primary issue is interpretation of the statute.

Analysis

The court first considers whether the plaintiff has standing to bring this claim under RSA 664:14-a, II (2004). "The general rule for standing is that a party may bring suit when 'the party [has] suffered a legal injury against which the law was designed to protect.'" Billewicz v. Ransmeier, 161 N.H. 145, 149 (2010) (internal quotations and citations omitted). "The plaintiff bears the burden of

sufficiently demonstrating a right to claim relief." Exeter Hosp. Med. Staff v. Board of Tr. of Exeter Health Res., Inc., 148 N.H. 492, 495 (2002); see also Libertarian Party of N.H. v. Sec'y of State, 158 N.H. 194, 195 (2008) (stating that "a party's standing is a question of subject matter jurisdiction, which may be addressed at any time"). Here, the parties disagree about whether the statute was designed to protect the plaintiff.

RSA 664:14-a, II provides that "[n]o person shall deliver or knowingly cause to be delivered a prerecorded political message unless the message contains, or a live operator provides, within the first 30 seconds of the message . . . [t]he name of the candidate or of any organization or organizations the person is calling on behalf of . . . [and] [t]he name of the person or organization paying for the delivery of the message and the name of the fiscal agent, if applicable." A "'prererecorded political message' means a prerecorded audio message delivered by telephone by . . . a candidate or political committee . . . ." RSA 664:14-a, I(a). "Any person injured by another's violation of this section may bring an action for damages . . . ." RSA 664:14-a, IV(b) (emphasis added).

Defendant Buckley contends that the statute was designed to protect only the recipient of the phone calls, not the candidate. The plaintiff claims that under the plain and ordinary meaning of the words used in the statute he is clearly an "injured person."

The interpretation of a statute is a matter of law. Goodreault v. Kleeman, 158 N.H. 236, 252 (2009). The court will consider the statute as a whole and construe the language in accordance with its plain and ordinary meaning. Id. If

the "statute's language is plain and unambiguous, [the court] need not look beyond it for further indication of legislative intent, and . . . will not consider what the legislature might have said or add language that the legislature did not see fit to include." Id. at 253. By contrast, if the statute is ambiguous, the court will look to the legislative history to aid its analysis. Id.

The phrase "any person injured" is not defined by statute. The court finds the phrase is susceptible to two reasonable interpretations. "[U]se of the word 'any' generally evidences that a statute should include a broad array of potential plaintiffs." Roberts v. General Motors Corp., 138 N.H. 532, 536 (1994). Further, the New Hampshire Supreme Court has interpreted such language in the context of the Consumer Protection Act quite broadly. LaChance v. U.S. Smokeless Tobacco Co., 156 N.H. 88, 94 (2007). Read in this context, a person mentioned in the prerecorded message could be considered an injured party, and thus have standing to sue.

On the other hand, prerecorded political messages are delivered by telephone, which presupposes only two parties: the person delivering the message, and the person receiving the message. The statute does not mention persons who are the subject matter of the phone call and places conditions only upon the person delivering the message. The statute also prohibits persons from knowingly delivering such messages to any telephone number on the "Do Not Call" list. RSA 664:14-a, III. This suggests the statute was designed to protect only the persons receiving the phone call, the potential voters. Accordingly, the

court finds the language of the statute is ambiguous and will look to the legislative history to aid its analysis.

The cause of action set out in RSA 664:14-a was created by the legislature in 2004 in response to significant "use of pre-recorded telephone messages by various political factions during the [2004] primary and general election." *An Act Relative to the Use of Prerecorded Telephone Messages by Candidates and Political Committees: Hearing on HB 332-FN Before the H. Comm. on Election Law*, (N.H. 2003) (testimony of Rep. Spiess, Prime Sponsor). The law was "intended to place a regulatory structure over the use of" automatic dialing systems to send out pre-recorded political messages. Id. According to Representative Spiess, there was great "concern" over these automatic phone calls. He testified before the House Election Law Committee that:

> This concern is shared by many of my constituents. I have never before experienced such a spontaneous visceral negative reaction to anything, like I received from voters to this practice. My friends and neighbors confronted me repeatedly as they entered and left the polls complaining about these calls. They were flat out annoyed, and put off by both the practice and the content. At a time when we have a legitimate cause for concern about voter apathy, I would suggest that we cannot afford to allow practices, which continue to alienate voters.

Id.

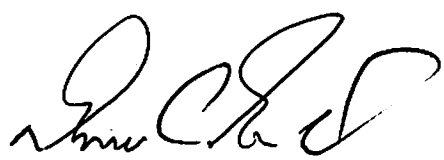
Against this backdrop, it is clear the statute was designed to protect the privacy of persons receiving these automated phone calls, not persons mentioned in the phone message. Accordingly, because the plaintiff has not alleged that he received a phone call from the defendants, he lacks standing to assert a cause of

action under RSA 664:14-a. The court need not reach the parties' remaining arguments.

While the defendant's pleading is titled motion for summary judgment, that portion of the motion which challenges the plaintiff's standing is more accurately characterized as a motion to dismiss for lack of subject matter jurisdiction. Because the court finds that the plaintiff does not have standing to bring this lawsuit, it GRANTS the motion and dismisses the lawsuit. Additionally, while the New Hampshire Democratic Party did not specifically join defendant Buckley's motion, see fn. 1, supra, this order applies to that defendant as well. In short, because Mr. O'Brien does not have standing, there is no subject matter jurisdiction.

SO ORDERED.

December 21, 2012



David A. Garfunkel
Presiding Justice

TITLE LXIII
ELECTIONS

CHAPTER 664
POLITICAL EXPENDITURES AND CONTRIBUTIONS

Political Advertising

Section 664:14-a

664:14-a Prerecorded Political Messages. –

I. In this section, "prerecorded political message" means a prerecorded audio message delivered by telephone by:

(a) A candidate or political committee; or

(b) Any person when the content of the message expressly or implicitly advocates the success or defeat of any party, measure, or person at any election, or contains information about any candidate or party.

II. No person shall deliver or knowingly cause to be delivered a prerecorded political message unless the message contains, or a live operator provides, within the first 30 seconds of the message, the following information:

(a) The name of the candidate or of any organization or organizations the person is calling on behalf of.

(b) The name of the person or organization paying for the delivery of the message and the name of the fiscal agent, if applicable.

III. No person shall deliver or knowingly cause to be delivered a prerecorded political message to any telephone number on any federal do not call list.

IV. (a) A violation of this section shall result in a civil penalty of $5,000 per violation.

(b) Any person injured by another's violation of this section may bring an action for damages and for such equitable relief, including an injunction, as the court deems necessary and proper. If the court finds for the plaintiff, recovery shall be in the amount of actual damages or $1,000, whichever is greater. If the court finds that the act or practice was a willful or knowing violation of this section, it shall award as much as 3 times, but not less than 2 times, such amount. In addition, a prevailing plaintiff shall be awarded the costs of the suit and reasonable attorney's fees, as determined by the court. Any attempted waiver of the right to the damages set forth in this paragraph shall be void and unenforceable. Injunctive relief shall be available to private individuals under this section without bond, subject to the discretion of the court. Upon commencement of any action brought under this section, the clerk of the court shall mail a copy of the complaint or other initial pleadings to the attorney general and, upon entry of any judgment or decree in the action, shall mail a copy of such judgment or decree to the attorney general.

Source. 2003, 258:1, eff. Jan. 1, 2004.