

HILLSBOROUGH, SS
SOUTHERN DISTRICT

STATE OF NEW HAMPSHIRE

SUPERIOR COURT

Betty R. Lasky
Neal Kurk, &
American Civil Liberties Union of New Hampshire Foundation

v.

The State of New Hampshire

Docket No. 226-2017-CV-340

**MOTION TO DISMISS THE PETITIONERS' AMENDED PETITION FOR
PRELIMINARY INJUNCTION, DECLARATORY JUDGMENT,
AND FINAL INJUNCTIVE RELIEF**

NOW COMES the respondent, Secretary of State William Gardner, by and through his attorneys, the Office of the Attorney General, and moves this Court to dismiss the Amended Petition for Preliminary Injunction, Declaratory Judgment, and Final Relief. In support thereof, the respondent states the following:

1. The petitioners seek a temporary and permanent injunction barring the Secretary of State from providing certain publicly available voter information to the recently created Presidential Advisory Commission on Election Integrity ("Commission"), of which the Secretary is a member, unless he complies with RSA 654:31, II and III. They also seek a declaratory judgment that the Secretary is obligated to follow those statutory provisions prior to providing the voter information to the Commission.

2. As set forth in detail in the accompanying Memorandum of Law in Opposition to the Petitioners' Amended Petition for Preliminary Injunction, Declaratory Judgment, and Final Relief, the petitioners lack standing to seek the requested relief and do not state a viable claim on the merits.

3. As to standing, the American Civil Liberties Union of New Hampshire Foundation (“ACLU”) does not have standing, either as an organization or an association, to challenge the Secretary’s actions here. The ACLU lacks organizational standing because it does not allege that any injury will result to the ACLU itself as a result of the Secretary’s provision of public information to the Commission. See *O’Brien v. NH Democratic Party*, 166 N.H. 138, 142 (2014) (“In evaluating whether a party has standing to sue, we focus on whether the party suffered a legal injury against which the law was designed to protect.”) (emphasis added). Further, the ACLU’s statement that it participated in the 2006 legislative process pertaining to RSA 654:31, II and III does not cure this defect because such legislative activity was simply in furtherance of the ACLU’s general purpose as an advocacy organization and thus does not form a legal interest and cannot constitute a concrete injury. See *Elec. Privacy Info. Ctr. v. United States Dep’t. of Educ.*, 48 F. Supp. 3d 1, *23-24 (D.D.C. Feb. 5, 2014) (finding pro-privacy entity lacked organizational standing to challenge amendments to federal regulations where it simply advocated against the changes in the ordinary course of pursuing “its purpose as an organization[.]”).

4. The ACLU also lacks standing as an association because it has not identified an actual member that it claims will suffer an injury-in-fact as a result of the transfer of public information to the Commission. Instead, the ACLU makes the bare assertion that some of its members “have indicated that they wish to protect their personal information consistent with current New Hampshire law and do not want their personal information disseminated to the Commission.” Am. Petition, ¶ 3. This is insufficient. The ACLU must do more than claim that its members maintain a general interest in a certain topic in order to demonstrate standing to challenge governmental conduct. See *Draper v. Healey*, 827 F.3d 1, 3 (1st Cir. 2016) (Souter, J.) (declining to find associational standing based on “an affidavit asserting that many of [an

association's] members asked it to take legal action[,]” explaining that “the association must, at the very least, identify a member who has suffered the requisite harm.”) (internal quotations and brackets omitted); *see also Appeal of N.H. Right to Life*, 166 N.H. 308, 314 (2014) (explaining “an association has no standing to challenge an administrative agency’s action based upon a mere interest in a problem[,]” and finding association lacked standing as it “did not allege a specific injury in fact,” but rather, “assert[ed] a generalized interest in . . . ensuring that the Board properly regulate clinics . . .”). Thus, the court should dismiss the ACLU from this action for lack of standing.

5. The individual petitioners similarly lack standing because they fail to show a personal legal or equitable right that is being or will be harmed. Rather, they raise a generalized grievance that is common to the public at large that is incapable of satisfying the standing requirement of a particularized and concrete injury. *See State v. Actavis Pharma, Inc.*, 2016-0199, slip op. (June 30, 2017) (“Neither an abstract interest in ensuring that the State Constitution is observed, nor an injury indistinguishable from a generalized wrong allegedly suffered by the public at large is sufficient to constitute a personal, concrete interest.”) (quotations omitted); *see also Lujan v. Defenders of Wildlife*, 504 U.S. 555, 573-74 (1992) (“[A] plaintiff raising only a generally available grievance about government -- claiming only harm to his and every citizen’s interest in proper application of the constitution and laws, . . . does not state an Article III case or controversy.”).

6. Moreover, the statutes that petitioners allege a violation of—654:31, II, III, and RSA 654:45—do not contain a private cause of action or right of enforcement. Consequently, the petitioners lack standing to utilize these statutes as a jurisdictional basis for maintaining this action. *See Actavis Pharma, Inc., supra*, slip op. at 7 (“There is nothing in the Ethics Code to

support a conclusion that the legislature intended to create a private right of action for its violation. Accordingly, we hold that the defendants do not have standing to bring claims under the Ethics Code.”). Thus, dismissal of this action in its entirety is warranted because all petitioners lack standing.

7. Further, viewing the allegations in the light most favorable to the petitioners, they have failed to state a claim upon which relief can be granted. *See Konefal v. Hollis/Brookline Coop. Sch. Dist.*, 143 N.H. 256, 258 (1998).

8. As explained in detail in the Respondent’s Memorandum of Law in Opposition to the Amended Petition for Injunctive Relief, it is well established that the voter checklist information at issue is publicly available to anyone who wishes to view it and is expressly subject to disclosure under RSA chapter 91-A. *See, e.g.*, RSA 654:31-a (“The information contained on the checklist of a town or city, specifically, the name, domicile address, mailing address, town or city, and party affiliation, if any, of registered voters, except as otherwise provided by statute, is public information subject to RSA 91-A.”) (emphases added); RSA 659:102 (“One marked copy of every checklist used in any election shall be turned over to the town or city clerk by the supervisors. The clerk shall preserve such checklists in his or her custody for a public record for a period set forth in RSA 33-A:3-a.”) (emphasis added); RSA 654:31, III (allowing any person to view a compilation of the information from all voter checklists statewide on the centralized voter registration database maintained by the Secretary of State).

9. Thus, the Secretary’s provision of the voter data to the Commission is not only permissible, but required under RSA chapter 91-A as the Secretary has received a request for specifically described, publicly available information from the Commission and, by law, must respond. RSA 91-A:4, IV (“[e]ach public body or agency shall, upon request for any

governmental record reasonably described, make available for inspection and copying any such governmental record within its files. . . .”). As a result, the Secretary’s action in providing the public voting information is proper as a matter of law.

10. Additionally, the petitioners’ only count in this action is for a claimed “violation of RSA 654:31(II)–(III) and RSA 654:45.” Am. Petition at 22. Although they strive to tie these statutes to a claim of a “violation of privacy,” *see id.* at ¶ 35, it is plain that the petitioners cannot hold a privacy interest in voter checklist information that is already broadly available to the public. Consequently, the alleged noncompliance with RSA 654:31, II, III and RSA 654:45 cannot constitute an actionable violation of privacy and, therefore, the petition fails on its face to state a claim for such and should be dismissed.

11. Lastly, because the petitioners do not state a claim, their request for injunctive relief must also fail. The issuance of an injunction, whether temporary or permanent, is an extraordinary remedy. To obtain such a remedy, the party seeking relief must demonstrate that there is an immediate danger of irreparable harm, no adequate remedy at law, and a likelihood of success on the merits. *New Hampshire Dept. of Envtl. Serv’s v. Mottolo*, 155 N.H. 57, 63 (2007).

12. For the same reasons that the petitioners lack standing and fail to state a claim on the merits, they also do not satisfy the threshold requirements for injunctive relief, namely a risk of irreparable harm, the lack of an adequate remedy at law, and success on the merits. For these reasons, and those stated more fully in the accompanying Memorandum of Law in Opposition to the Petitioners’ Amended Petition for Preliminary Injunction, Declaratory Judgment, and Final Relief, incorporated by reference herein, the Court should dismiss this action in its entirety.

WHEREFORE, the respondent respectfully requests that this Honorable Court:

- A. Dismiss the Amended Petition for Preliminary Injunction, Declaratory Judgment, and Final Relief; and
- B. Grant such further relief as may be deemed just.

Respectfully submitted,

WILLIAM M. GARDNER,
SECRETARY OF STATE

By his attorneys,

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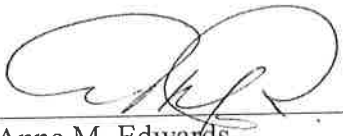
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August 7, 2017

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was transmitted by electronic mail to Paul Twomey, Esq., Gilles Bissonnette, Esq. and William E. Christie, Esq., counsel of record.

August 7, 2017


Anne M. Edwards