

News > State (/News/State/)

Ballot question would give N.H. taxpayers expanded ability to sue government

By ETHAN DeWITT
Monitor staff

Tuesday, October 23, 2018

In 2009, Jim Baer sued the New Hampshire Department of Education, seeking to stop the use of state funding for improvements to Concord elementary schools.

The Supreme Court threw out the suit. As a mere resident with no children in the schools, Baer didn't have a big enough stake to merit a legal challenge, they wrote.

Nine years later, Baer is still smarting. "I pay taxes like everybody else," he said. "And I felt terribly discriminated against because of that. Just because I don't have children, I don't have a say in how my taxes are going to be spent?"

In 2014, Bill Duncan and seven other taxpayers sued the state over the Education Tax Credit program, arguing it was unconstitutional. That lawsuit was also quashed. Again, the Supreme Court wrote, merely paying taxes is not enough to allow one to sue the state.

Now, a coalition of lawmakers and taxpayers are seeking the ultimate override: a constitutional amendment. And this time, the final say will be up to voters.

New Hampshire Ballot Question 1, set to appear before every person in a voting booth on Nov. 6, would enshrine the right to "taxpayer standing" in the state constitution. The amendment would allow citizens to challenge financial decisions made by state and local agencies if they deem them unlawful or unconstitutional.

The proposal has commanded broad support from legal activist groups, taxpayer advocacy groups and both major political parties.

Here's what you need to know:

What does the amendment do?

The amendment gives any individual taxpayer who is eligible to vote in the state the standing to sue a public agency in Superior Court over any spending approvals "in violation of a law, ordinance, or constitutional provision."

In civil court cases, standing is important. Without sufficient proximity to the issue at hand, any suit can be thrown out before the merits of the arguments are presented or even considered.

Ballot Question 1 would secure that standing for all taxpayers, pushing aside previous Supreme Court rulings on it.

If it passes, any spending decision could theoretically be open to a legal challenge.

But the proposed right is not absolute. If a process already exists to lodge a complaint against the public body or file an appeal, the taxpayer will have to go through that avenue instead of the courts, the language says.

The proposed language – four sentences long – would be added to Article 8 of the state constitution, which deals with government accountability.

Is this a new proposal for New Hampshire?

No. Until recently, the tactic was recognized by the courts for decades, according to Chuck Douglas, former state supreme court justice and a strong proponent of the amendment.

In the 1974 Supreme Court case of (<https://law.justia.com/cases/new-hampshire/supreme-court/1974/6757-0.html>) *Green v. Shaw*, Douglas noted, six former and three sitting Rochester city council members sought to bring action against the city's mayor for illegal actions.

Justice Robert Griffith was clear: "It is well settled in this State that plaintiffs, as taxpayers, have standing to seek redress for the unlawful acts of their public officials."

Legal standing did not depend on those plaintiffs being directly financially impacted by their mayor's actions, Griffith said.

That decision set the standard for decades. But in 2001, courts began to impose higher requirements for taxpayer standing, including, in some cases, that the affected parties be directly harmed.

By Baer's case in 2009, the Supreme Court was pointing to a statute change that "implicitly overruled" its earlier decisions.

"(The plaintiffs) have asserted no interest other than one shared by all Concord taxpayers, which is insufficient to maintain standing in a declaratory judgment action," wrote Justice Linda Dalianis in the Baer decision. The court dismissed the case.

Speaking Tuesday, Baer, a self-described frequent agitator of Concord leadership, said the decision had demoralized him. "It was such a bruising defeat, I just kind of folded my tent and said, you know what, you can't fight city hall," he recalled.

By 2012, the Legislature had sprung into action, passing an amendment reaffirming taxpayer standing, in direct response to the Baer case.

But in the 2014 Duncan case, the Supreme Court struck back, upholding its Baer decision and determining the new statute unconstitutional.

Against such decisive opinions, supporters of the amendment now argue that amending the constitution is the only way to finally supersede the court.

How would it jibe with federal law?

A broad right to taxpayer standing doesn't exist in the federal court system. The U.S. Supreme Court has consistently held that more is needed than mere taxpayer status to confer a legal right against the government – largely in the interest of practicality.

That standard, which Douglas called “quite restrictive,” has been followed in recent decisions by the New Hampshire Supreme Court, despite the fact that the state constitution predates the federal one, he said.

“It makes it virtually impossible for taxpayers to ever go to court,” said Douglas, who has teamed up with former plaintiff Bill Duncan in advocating for the amendment.

If the constitutional amendment does get voted through, Douglas said, it would take precedence over the federal standard, as long as the plaintiffs stuck to the state court system.

The amendment already passed both chambers of the Legislature nearly unanimously – 22-2 in the Senate and 309-9 in the House – easily clearing the three-fifths minimum required by the U.S. Constitution.

It now goes before voters Nov. 6, where it will need a two-thirds majority to pass into law.

What do stakeholders think?

Broadly, legal observers and political advocates on both the left and right appear to support the amendment. At a Senate hearing in March, groups as diverse as the left-leaning Americans for Civil Liberties Union and the right-leaning Granite State Taxpayers came out to voice support.

“This is a process to restore the rights of taxpayers to be involved in local government, and if they don't have a right to challenge their local government, why bother going?” Ed Naile of the Coalition of New Hampshire Taxpayers said then.

Gilles Bissonnette, legal director for the New Hampshire ACLU, said it would restore what had been a longstanding right for Granite Staters for 100 years. And both the state Democratic and Republican Executive Committees have passed resolutions urging the passage of the amendment.

But some have raised questions. In a March hearing, Howard Zibel, general counsel for the judicial branch, which is neutral on the amendment, brought up two major concerns from the court system. First, he said, the amendment could increase the caseload for superior courts and the Supreme Court, possibly necessitating more judges and opening the courts to frivolous cases.

Secondly, Zibel brought up worries that the amendment could make judges into “a super legislator or super executives,” more apt to use their power to override the decision-making power of public authorities.

Bissonnette pushed back on that.

“I would disagree that this gives courts unbridled authority,” he said. “It gives them the authority that they had for a hundred years.”

To Douglas, the case for the amendment comes down to simple rationale.

“It’s just the only way you can make government accountable to the voters,” he said.

(Ethan DeWitt can be reached at edewitt@cmonitor.com, at 603 369-3307 or on Twitter at [@edewittNH](https://twitter.com/edewittNH).)