

**THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH**

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RULE 7 NOTICE OF DISCRETIONARY APPEAL

This form should be used only for an appeal from a final decision on the merits issued by a superior court or circuit court in (1) a post-conviction review proceeding; (2) a proceeding involving the collateral challenge to a conviction or sentence; (3) a sentence modification or suspension proceeding; (4) an imposition of sentence proceeding; (5) a parole revocation proceeding; (6) a probation revocation proceeding; (7) a landlord/tenant action or a possessory action filed under RSA chapter 540; (8) an order denying a motion to intervene; or (9) a domestic relations matter filed under RSA chapters 457 to 461-A, except that an appeal from the first final order should be filed on a Rule 7 Notice of Mandatory Appeal form.

1. COMPLETE CASE TITLE AND CASE NUMBERS IN TRIAL COURT, * See attached for complete case title

**603 Forward, et al. v. Scanlan and Formella
226-2022-CV-00233; 226-2022-CV-00236**

2. COURT APPEALED FROM AND NAME OF JUDGE(S) WHO ISSUED DECISION(S)

Hillsborough Superior Court Southern District; Colburn, J.

3A. APPEALING PARTY: NAME, MAILING ADDRESS, E-MAIL ADDRESS, AND TELEPHONE NUMBER.

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Elliot Gault, Executive Director**

E-Mail address: **Elliot@nhgop.com**

Telephone number: **(603) 225-9341 ext**

3B. APPEALING PARTY'S COUNSEL: NAME, BAR ID NUMBER, FIRM NAME, MAILING ADDRESS, E-MAIL ADDRESS, AND TELEPHONE NUMBER.

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4A. OPPOSING PARTY: NAME, MAILING ADDRESS, E-MAIL ADDRESS, AND TELEPHONE NUMBER.

See attached

E-Mail address: _____

Telephone number: _____

4B. OPPOSING PARTY'S COUNSEL: NAME, BAR ID NUMBER, FIRM NAME, MAILING ADDRESS, E-MAIL ADDRESS, AND TELEPHONE NUMBER.

See attached

E-Mail address: _____

Telephone number: _____

RULE 7 NOTICE OF DISCRETIONARY APPEAL

5. NAMES OF ALL OTHER PARTIES AND COUNSEL IN TRIAL COURT

6. DATE OF CLERK'S NOTICE OF DECISION OR SENTENCING.

12/21/2022

DATE OF CLERK'S NOTICE OF DECISION ON POST-TRIAL MOTION, IF ANY.

7. CRIMINAL CASES: DEFENDANT'S SENTENCE AND BAIL STATUS

8. APPELLATE DEFENDER REQUESTED?

YES or NO: No

IF YOUR ANSWER IS YES, YOU MUST CITE STATUTE OR OTHER LEGAL AUTHORITY UPON WHICH CRIMINAL LIABILITY WAS BASED AND SUBMIT A CURRENT REQUEST FOR A LAWYER FORM (FINANCIAL STATEMENT). SEE SUPREME COURT RULE 32(4).

9. IS ANY PART OF CASE CONFIDENTIAL?

YES or NO: No

IF SO, IDENTIFY WHICH PART AND CITE AUTHORITY FOR CONFIDENTIALITY. SEE SUPREME COURT RULE 12.

10. IF ANY PARTY IS A CORPORATION LIST THE NAMES OF PARENTS, SUBSIDIARIES AND AFFILIATES.

The New Hampshire Republican State Committee is a New Hampshire voluntary corporation. It has no parents, subsidiaries, or affiliates.

11. DO YOU KNOW OF ANY REASON WHY ONE OR MORE OF THE SUPREME COURT JUSTICES WOULD BE DISQUALIFIED FROM THIS CASE?

YES or NO: No

IF YOUR ANSWER IS YES, YOU MUST FILE A MOTION FOR RECUSAL IN ACCORDANCE WITH SUPREME COURT RULE 21A.

12. IS A TRANSCRIPT OF TRIAL COURT PROCEEDINGS NECESSARY FOR THIS APPEAL? SEE SUPREME COURT RULE 15, COMMENT.

YES or NO: No

IF YOUR ANSWER IS YES, YOU MUST COMPLETE THE TRANSCRIPT ORDER FORM ON PAGE 4 OF THIS FORM.

RULE 7 NOTICE OF DISCRETIONARY APPEAL

13. NATURE OF CASE AND RESULT (Limit two pages double-spaced; please attach or include.)

For this section and section 14, you may choose to use the five-page, single-spaced Additional Information Pages form. The five-page Additional Information Pages form is available on the judicial branch website: <https://www.courts.state.nh.us/supreme/forms/index.htm>.

14. ISSUES ON APPEAL (Limit eight pages double-spaced; please attach or include.)

You may choose to use the same five-page, single-spaced Additional Information Pages form identified in section 13.

The New Hampshire Supreme Court reviews each discretionary notice of appeal and decides whether to accept the case, or some issues in the case, for appellate review. The following acceptance criteria, while neither controlling nor fully describing the court's discretion, indicate the character of the reasons that will be considered.

1. The case raises a question of first impression, a novel question of law, an issue of broad public interest, an important state or federal constitutional matter, or an issue on which there are conflicting decisions in New Hampshire courts.
2. The decision below conflicts with a statute or with prior decisions of this court.
3. The decision below is erroneous, illegal, and unreasonable or was an unsustainable exercise of discretion.

Separately number each issue you are appealing and for each issue: (a) state the issue; (b) explain why the acceptance criteria listed above support acceptance of that issue; and (c) if a ground for appeal is legal sufficiency of evidence, include a succinct statement of why the evidence is alleged to be insufficient as a matter of law.

15. ATTACHMENTS

Attach to or include with this notice of appeal the following documents in order: (1) a copy of the trial court decision or order from which you are appealing; (2) the clerk's notice of the decision below; (3) any court order deciding a timely post-decision motion; and (4) the clerk's notice of any order deciding a timely post-decision motion.

Do not attach or include any other documents with this notice of appeal. Any other documents you wish to submit must be included in a separate Appendix, which must have a table of contents on the cover and consecutively numbered pages.

16. CERTIFICATIONS

I hereby certify that every issue specifically raised has been presented to the court below and has been properly preserved for appellate review by a contemporaneous objection or, where appropriate, by a properly filed pleading. To the extent that an unpreserved issue is raised as plain error, I hereby certify that I have specifically identified that issue as plain error in section 14.

/s/ Bryan K. Gould

Appealing Party or Counsel

I hereby certify that on or before the date below, copies of this notice of appeal were served on all parties to the case and were filed with the clerk of the court from which the appeal is taken in accordance with Supreme Court Rules 5(1) and 26(2) and with Rule 18 of the Supplemental Rules of the Supreme Court.

1/20/2023

Date

/s/ Bryan K. Gould

Appealing Party or Counsel

ATTACHMENTS TO RULE 7 NOTICE OF APPEAL OF
THE NEW HAMPSHIRE REPUBLICAN STATE COMMITTEE

603 Forward, et al. v. Scanlan and Formella
Hillsborough Superior Court (South) Docket Nos. 226-2022-CV-00233; 226-2022-CV-00236

1. COMPLETE CASE TITLE AND CASE NUMBERS IN TRIAL COURT

Consolidated actions

603 Forward; Open Democracy Action; Louise Spencer; Edward R. Friedrich; and Jordan M. Thomson v. David M. Scanlan, in his official capacity as the Acting New Hampshire Secretary of State and John Formella, in his official capacity as the New Hampshire Attorney General

Hillsborough Superior Court Southern District Docket No. 226-2022-CV-00233 and

Manuel Espitia, Jr. and Daniel Weeks v. David M. Scanlan, in his official capacity as the Acting New Hampshire Secretary of State and John Formella, in his official capacity as the New Hampshire Attorney General

Hillsborough Superior Court Southern District Docket No. 226-2022-CV-00236

4A. OPPOSING PARTY: NAME, MAILING ADDRESS, E-MAIL ADDRESS, AND TELEPHONE NUMBER.

4B. OPPOSING PARTY'S COUNSEL: NAME, BAR ID NUMBER, FIRM NAME, MAILING ADDRESS, E-MAIL ADDRESS, AND TELEPHONE NUMBER.

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13. NATURE OF CASE AND RESULT (Limit two pages double-spaced; please attach or include.)

This appeal arises from two consolidated actions challenging the constitutionality of the recently enacted Senate Bill 418 (“SB 418”). SB 418, passed on March 31, 2022, and effective January 1, 2023, amends RSA ch. 659 and 660 to provide for an “affidavit ballot” for election day registrants who fail to establish their identities in the manner prescribed by statute. The votes cast by affidavit ballot are counted on election day, but if a voter fails to provide proof of qualification to vote within seven days the ballot is nullified and the votes cast by that ballot are deducted from the final vote totals “to be certified by the appropriate certifying authority.” RSA 659:23-a, VI.

In June of 2022, the plaintiffs in the two consolidated actions sued the secretary of state and the attorney general alleging that wrongful voting (also known as voter fraud, *see* RSA 659:34) does not occur in New Hampshire and that SB 418 would therefore unreasonably interfere with the right to vote and invade a voter’s privacy. Appendix (“Appx.”) at 1-4, 242-43. In both complaints, the plaintiffs alleged that SB 418 was adopted along a party-line vote, with the implication being that the motive of the Republicans in the general court in passing the legislation was to suppress the votes of Democratic voters. Appx. at 4, 24-25, 245.

In September, shortly after the state filed a motion to dismiss the consolidated actions, the New Hampshire Republican State Committee (“NHRSC”) filed a motion to intervene to defend against the plaintiffs’ claims. Appx. at 274. The interest the NHRSC asserted in support of its motion was essentially threefold. First, the NHRSC established that its own membership depends on the integrity of the state’s primary elections because it is in the state primary that the delegates to the NHRSC’s convention are elected by registered Republicans. Appx. at 278-79. It is these delegates who elect the members of the NHRSC in caucuses held after the state

general election. Second, the NHRSC sought to protect the constitutional rights of Republican voters to vote and Republican candidates to be elected against de facto cancellation of Republican votes by ballots cast by individuals not qualified to vote under New Hampshire law. Appx. at 279. It cited authority from across the country establishing that political parties are commonly allowed to intervene in actions challenging such statutory provisions as those governing voter qualifications. Appx. at 277-78. Third, the NHRSC noted that it would have to divert resources to reeducate staff, volunteers, and voters if the new affidavit ballot provisions were invalidated. Appx. at 279.

The plaintiffs objected to intervention both on the ground that the NHRSC did not meet the standard for intervention and that the NHRSC had retained its counsel to disqualify the judge assigned to the case, Charles Temple.¹ Appx. at 286-96. After the NHRSC filed its reply in support of its motion, Judge Temple recused himself from deciding the motion to intervene and transferred the motion to Judge Colburn for resolution with the proviso that if Judge Colburn granted intervention she would become the presiding judge in the case. Appx. at 370, 385. Judge Colburn issued an order denying the NHRSC's motion on December 21, 2022. *Post* at 16-19. It is this order that the NHRSC now appeals.

¹ Judge Temple and the NHRSC's counsel, Bryan Gould, and their families have been friends for over thirty years.

14. ISSUES ON APPEAL (Limit eight pages double-spaced; please attach or include.)
Separately number each issue you are appealing and for each issue: (a) state the issue; (b) explain why the acceptance criteria listed above support acceptance of that issue; and (c) if a ground for appeal is legal sufficiency of evidence, include a succinct statement of why the evidence is alleged to be insufficient as a matter of law.

A. Statement of Issues Presented

This notice of appeal raises two issues of first impression for this court as well as a third issue arising from an error constituting an unsustainable exercise of discretion. They are, respectively:

1. Whether the superior court erred in incorporating an adequate representation element drawn from federal law into New Hampshire's long-established standard for intervention.
2. Whether a state political party is entitled to intervene in litigation over the lawfulness of a statute prescribing how a prospective voter must establish his or her qualification to vote, particularly where a party in the litigation has placed at issue the political party's partisan motives in adopting the statute.
3. Whether the superior court committed an unsustainable exercise of discretion by failing to consider each of the factual grounds on which the NHRSC sought intervention.

B. Grounds for Acceptance of Each Issue

Issue 1: *Whether the superior court erred in incorporating an adequate representation element drawn from federal law into New Hampshire's long-established standard for intervention.*

New Hampshire's standard for intervention is liberal. N.H. Super. Ct. R. 15 provides that "any person shown to be interested may become a party to any civil action upon filing and service of an [a]pppearance and pleading briefly setting forth his or her relation to the cause" While the trial courts possess discretion to grant or deny intervention according to this standard,

this court has stated that “a trial court should grant a motion to intervene if the party seeking to intervene has a right involved in the trial and a direct and apparent interest therein.” *Brzica v. Trustees of Dartmouth Coll.*, 147 N.H. 443, 446 (2002). Because of the simplicity of the New Hampshire standard, “the right of a party to intervene in pending litigation in this state has been rather freely allowed as a matter of practice.” *Id.*, quoting *Scamman v. Sondheim*, 97 N.H. 280, 281 (1952). An intervenor’s interest must nonetheless be one that “would suffer if not indeed be sacrificed were the court to deny the privilege.” *In re Stapleford*, 156 N.H. 260, 263 (2007). Except in those cases in which the prospective intervenor has no discernible legal right affected by the litigation (*see, e.g., Samyn-D’Elia Architects v. Satter Companies of N.E., Inc.*, 137 N.H. 174, 177-78 (1993)), the supreme court’s decisions reflect how freely New Hampshire allows intervention. *See, e.g., In re Londonderry Neighborhood Coalition*, 145 N.H. 201, 203 (2000); *In re Goodlander*, 161 N.H. 490, 506 (2011); *Lamarche v. McCarthy*, 158 N.H. 197, 200-201 (2008); and *Snyder v. N.H. Sav. Bank*, 134 N.H. 32, 34 (1991).

By contrast, the federal standard for intervention is substantially more restrictive. Fed. R. Civ. P. 24(a) provides, in pertinent part:

On a timely motion, the court must permit anyone to intervene who:

- (1) is given an unconditional right to intervene by a federal statute; or
- (2) claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant’s ability to protect its interest, *unless existing parties adequately represent that interest.*

Emphasis supplied.

This adequate representation standard creates a higher bar to intervene in federal actions because it makes intervention dependent not on whether the prospective intervenor has a direct and apparent interest but on whether an original party has a sufficiently analogous interest to that

of the prospective intervenor to be representative. This court, however, has never adopted the adequate representation standard by either rule change or a common law decision on intervention. Instead, it has consistently applied the rule that a “direct and apparent interest” that would “suffer” or “be sacrificed” is necessary to support intervention.

The superior court relied on four cases to support its conclusion that the NHRSC should not be allowed to intervene because the Office of the Attorney General would adequately represent its interests. *Post* at 19 n.1. The first of these, *Mass. Food Ass’n v. Mass. Alcoholic Beverages Control Comm’n*, 197 F.3d 560, 567 (1st. Cir. 1999) relied on the federal rule which, again, explicitly provides that intervention can be denied if the prospective intervenor’s interest will be adequately protected by a party to the action. The second case, *In re Stapleford*, 156 N.H. 260, 262 (2007), held that because “minors do not have the same legal rights as do adults,” including the right to “participate in litigation,” the minor children seeking to intervene in their parents’ divorce action in that case would not be permitted to do so because their interests, by statute, were represented by the guardian ad litem. *Id.* at 263-65. The court made a point of observing that because the rights at issue were inherently constrained by law, it was not applying “the traditional intervention test.” *Id.* at 263.

The third case on which the superior court relied, *Tweed v. Town of Nottingham*, 2019 WL 12875417, at *7-8 (N.H. Super. Aug. 6, 2019), was a decision of another superior court judge. *Tweed* cited *Stapleford* for the proposition that New Hampshire trial courts can deny intervention as a general proposition if a party to the litigation – in that case, the town government – adequately represents the interests of the prospective intervenors (who in that case were town residents). *Post* at 19 n.1. The final case the court below cited was *G2003B, LLC v. Town of Weare*, 153 N.H. 725, 726 (2006) which it summarized in the following parenthetical:

“(noting that trial court allowed town residents to intervene to defend validity of ordinance where town admitted it did not intend to provide a ‘vigorous defense of the action’).” *Id.*

The authorities on which the superior court relied underscore the need for this court to decide whether a prospective intervenor other than a minor can be denied intervention on the ground that a party to the case adequately represents the interests the prospective intervenor seeks to protect. Both *Tweed* and the superior court’s order below construe *Stapleford* as adopting a general standard of adequate representation even though *Stapleford* itself took pains to explain that because the prospective intervenors were minors it was not applying the traditional test of intervention. The superior court also interpreted *G2003B, LLC* as implying that the prospective intervenors in that case would not have been allowed to intervene had the town provided a “vigorous defense of the action.” *G2003B*, however, did not consider or rule upon whether the adequate representation standard is a part of the New Hampshire test for intervention.

The superior courts have now on at least two occasions misconstrued *Stapleford* as a de facto engrafting of what amounts to the federal adequate representation standard onto New Hampshire’s traditional test for intervention. This court has never adopted an adequate representation standard in any fashion outside of the unique context of whether minors should be allowed to intervene in their parents’ divorce proceedings where they are represented, as required by state law, by a guardian ad litem. Accordingly, the court should accept the first issue raised by this notice of appeal for briefing and decision.

Issue 2: *Whether a state political party is entitled to intervene in litigation over the lawfulness of a statute prescribing how a prospective voter must establish his or her qualification to vote, particularly where a party in the litigation has placed at issue the political party's partisan motives in adopting the statute.*

In effect, the superior court ruled that, absent extenuating circumstances like a conflict of interest, a state political party cannot intervene in an action seeking to set aside a voter qualification statute if the attorney general is defending the law. *Post* at 18-19. The court did not conclude that the NHRSC has no interest in defending against plaintiffs' claims. Indeed, it implicitly assumed without deciding that the NHRSC has an interest in the validity of SB 418. To avoid another appeal after remand, and as a matter of judicial efficiency, this court should address whether state political parties must be allowed to intervene in actions that seek to invalidate statutory provisions that attempt to achieve the delicate balance of ensuring that qualified individuals can vote while preventing the cancellation of such an individual's vote by someone who is not qualified to cast a ballot.

In one case, the superior court has held that a political party (in that case, the Republican National Committee or "RNC") could intervene to protect its interest in the statutory procedure for absentee registration and voting. *American Federation of Teachers, et al. v. Gardner, et al.*, No. 218-2020-CV-0570, at 6 (N.H. Super. Ct. Sept. 4, 2020) (Among other things the court found that "[e]lecting Republican candidates to office and ensuring high turnout of voters is clearly a prime function and interest of" the RNC). Appx. at 279-80.² This appeal presents the court with an opportunity to resolve the question whether *American Federation* correctly held that political parties generally have a sufficient interest in the law governing voter qualifications

² Citing federal law, the court also noted that adequacy of representation was "a consideration" but rejected it as a basis to deny intervention in that instance. Appx. at 280. This further underscores the need for an authoritative decision from this court as to whether adequacy of representation is a factor to be considered under the traditional test for intervention.

to intervene in actions seeking to invalidate statutes defining or regulating those qualifications, irrespective of whether the state is defending their validity.

In the alternative, this court should direct the superior court on remand to grant the NHRSC's motion to intervene under the particular facts of this case. In addition to NHRSC's interest in the law governing voter qualifications, the complaints allege that SB 418 was a partisan attempt to unlawfully interfere with the right to vote of Democratic Party voters (Appx. at 24-25, 294, n.8), it is uncontested that the members of the NHRSC are elected by delegates who are in turn elected at a state primary by what are supposed to be qualified Republican voters, and the NHRSC will have to divert resources to reeducate its staff, volunteers, and voters if SB 418 is invalidated. As a matter of law, then, the NHRSC has a direct and apparent interest in the outcome of the litigation that will likely be adversely affected if the plaintiffs prevail.

Even if the court does decide to adopt the adequate representation standard, the NHRSC should still be granted intervention. Federal courts across the country usually hold that political parties have a sufficient interest in litigation over the substantive provisions of election-related statutes to intervene in actions challenging those provisions, even where the state is defending the law. Appx. at 277-78. The NHRSC has done much more than make the required "minimal" showing that the Attorney General's office would not adequately represent its interests, which is all that is required. Notably, there is no presumption, even under the federal standard, of adequate representation unless parties' "interests overlap fully." See *Trbovich v. United Mine Workers*, 404 U.S. 528 (1972); see also *Berger v. North Carolina State Conf. of the NAACP*, 142 S.Ct. 2191 (2022). As discussed above, NHRSC's interests are unique from the state's, are not adequately represented by the state, and do not overlap with the separate and distinct interests the state is pursuing in this case. Under either standard, intervention should be granted.

Concededly, there are also conflicting federal decisions applying the federal standard, but the fact that federal courts commonly grant intervention to political parties in such cases despite the more rigorous standard militates in favor of a decision by this court that political parties should be allowed to intervene in cases like this one as a matter of law. Accordingly, the NHRSC respectfully requests that the court accept the second issue raised by this notice of appeal for briefing and decision.

Issue 3: *Whether the superior court committed an unsustainable exercise of discretion by failing to consider each of the factual grounds on which the NHRSC sought intervention.*

In its analysis of the NHRSC's arguments on its motion to intervene, the superior court unsustainably exercised its discretion when it failed to consider the interests the NHRSC asserted in support of intervention. As rendered by the superior court, the NHRSC "seeks to intervene to 'represent itself, registered Republicans, and its members, in preventing the loss of the protections of fair elections that would result from the invalidation of SB 418.'" *Post* at 18. This characterization of the NHRSC's interests does not fairly reflect all of the interests demonstrated by the NHRSC in its papers. Nowhere in the court's order did it acknowledge that the NHRSC's members are elected by delegates who are themselves elected in the state primary.³ This selection process directly ties the integrity of the state's elections to the composition of the NHRSC's governing body. Nor did the order mention the NHRSC's interest in preventing the diversion of its resources to reeducation of its staff, volunteers, and voters if the law is invalidated.

³ The NHRSC explained this process for determining its membership in greater detail in its papers: essentially the delegates are elected by popular vote and then convene in a caucus to select the NHRSC's members, who comprise the governing body of the NHRSC. *Appx.* at 373.

For the court's exercise of discretion to be sustainable, the court must actually consider the grounds asserted by a prospective intervenor to support intervention. In this case, the superior court did not so much as mention the NHRSC's interest in voter qualification statutes because of the direct impact it can have on the membership of the NHRSC, not to mention the other two proffered interests. Its failure to consider or address these bases for intervention was an unsustainable exercise of discretion, and the NHRSC respectfully requests that the court accept the third issue presented by this notice of appeal for briefing and decision.

THE STATE OF NEW HAMPSHIRE

**HILLSBOROUGH, SS
SOUTHERN DISTRICT**

**SUPERIOR COURT
No. 2022-CV-00233**

Docket No. 226-2022-CV-00233

603 Forward; Open Democracy Action; Louise Spencer; Edward R. Friedrich; and
Jordan M. Thompson

v.

David M. Scanlan, in his official capacity as the Acting Secretary of State; and
John M. Formella, in his official capacity as the New Hampshire Attorney General

and

Docket No. 226-2022-CV-00236

Manuel Espitia, Jr. and Daniel Weeks

v.

David M. Scanlan, in his official capacity as the New Hampshire Secretary of State; and
John M. Formella, in his official capacity as the New Hampshire Attorney General

ORDER ON MOTION TO INTERVENE

The plaintiffs have brought these consolidated actions challenging the constitutionality of a newly enacted law affecting voters who are unable to produce proper photo identification prior to voting. See Laws 2022, ch. 239 (“SB 418”). The New Hampshire Republican State Committee (“NHRSC”) now moves to intervene. The plaintiffs object. For the reasons that follow, NHRSC’s motion to intervene is DENIED.

Background

Current “New Hampshire law allows for votes to be cast and counted by signing an affidavit, even when the voter fails to produce documents to prove his or her identity[.]” Laws 2022, ch. 239:1, II. In the legislature’s view, “[a]llowing [these] votes to count in an election enables the corruption of New Hampshire’s electoral process,” and therefore it passed SB 418 “to restore the integrity of New Hampshire elections.” Laws

2022, ch. 239:1, I. In (alleged) furtherance of that goal, SB 418 creates a new type of ballot known as an “affidavit ballot” for voters who are unable to prove their identity with proper identification when requesting a ballot. Laws 2022, ch. 239:2. If a voter is required to use an “affidavit ballot,” the voter is given “an affidavit voter package,” which includes a prepaid overnight mail envelope, a list of “the documents required to qualify to vote in the state of New Hampshire,” and a letter indicating which “qualifying documents were not provided” at the polling location. Id. The voter must then “return their copy of the . . . letter and a copy of any required documentation to the secretary of state in the provided . . . envelope within 7 days of the date of the election in order for the ballot to be certified,” a process informally known as “curing.” Id. If the voter fails to return the necessary documentation within the seven-day period, “[t]he votes cast on such unqualified affidavit ballots shall be deducted from the vote total for each affected candidate or each affected issue.” Id. The governor signed SB 418 into law on June 17, 2022, and it takes effect on January 1, 2023.

After SB 418 was enacted, the plaintiffs brought this action challenging the constitutionality of the law. Specifically, the plaintiffs assert that SB 418 violates: (1) Part I, Article 11 of the State Constitution; (2) the State Constitution’s guarantee of equal protection under the law; (3) Part I, Article 2-b of the State Constitution; (4) Part I, Article 15 of the State Constitution; and (5) Part II, Article 32 of the State Constitution. As is customary when challenging the constitutionality of election laws, the plaintiffs filed this suit against the secretary of state and the attorney general in their official capacities. Both defendants are now being represented by career attorneys employed by the New Hampshire Attorney General’s Office (“NHAGO”). Nonetheless, NHRSC

now moves to intervene in this action to join in the defense of SB 418’s constitutionality. NHRSC is “a political committee dedicated to advancing the interests of the Republican Party and Republican voters and protecting the rights of its members, including its members’ right to fair elections.” (NHRSC’s Mot. at 3.) It seeks to intervene to “represent itself, registered Republicans, and its members, in preventing the loss of the protections of fair elections that would result from the invalidation of SB 418.” (Id.)

Analysis

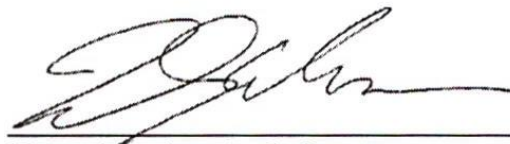
Pursuant to Superior Court Rule 15, “Any person shown to be interested may become a party to any civil action upon filing and service of an Appearance and pleading briefly setting forth his or her relation to the cause.” Although intervention “in pending litigation in this state has been rather freely allowed as a matter of practice,” Lamarche v. McCarthy, 158 N.H. 197, 200 (2008), “[w]hether to grant a motion to intervene is a matter committed to the trial court’s discretion,” Garod v. Steiner Law Office, PLLC, 170 N.H. 1, 6 (2017). In deciding whether to grant a motion to intervene, the supreme court has directed trial courts to use the following standard: “A person who seeks to intervene in a case must have a right involved in the trial and his interest must be direct and apparent; such as would suffer if not indeed be sacrificed were the court to deny the privilege.” Snyder v. N.H. Sav. Bank, 134 N.H. 32, 35 (1991) (cleaned up).

Here, NHRSC’s ultimate objective, should it be allowed to intervene, is the same as the existing defendants—to have SB 418 upheld as constitutional. However, as noted above, NHAGO career prosecutors are representing the defendants and, in doing so, are already defending the constitutionality of SB 418. Indeed, NHRSC itself admits that the “[NHAGO] is tasked with enforcing the state’s election laws[.]” (NHRSC’s Mot.

at 5 n.2) There is absolutely no indication (or even a suggestion) that the NHAGO has not or will not vigorously defend the constitutionality of SB 418 in this matter.¹ Nor is there any indication that the NHAGO has “a conflict of interest, ineffectiveness, or lack of resources.” In re Trust of Eddy, 172 N.H. 266, 279 (2019) (trial court properly denied potential trust beneficiary standing to intervene in trust matter where NHAGO was already participating pursuant to statutory authority). In the absence of such a showing, the Court concludes that NHRSC’s interests are adequately protected and therefore its interests will not “suffer” or otherwise “be sacrificed” if it is not permitted to intervene. Snyder, 134 N.H. at 35.² Accordingly, NHRSC’s motion to intervene is DENIED.

So ordered.

Date: December 21, 2022



Hon. Jacalyn A. Colburn,
Presiding Justice

¹ See, e.g., Mass. Food Ass’n v. Mass. Alcoholic Beverages Control Comm’n, 197 F.3d 560, 567 (1st Cir. 1999) (holding that intervention was not required where there was “no doubt that [government defendant] was zealously interested in upholding the validity of the [challenged] statute”); In re Stapleford, 156 N.H. 260, 262 (2007) (holding that trial court did not err in denying children’s attempt to intervene in their parents’ divorce case where their interests were adequately represented by GAL); Tweed v. Town of Nottingham, No. 218-2019-CV-0398, 2019 N.H. Super. LEXIS 25, at *20 (Aug. 6, 2019) (noting that “whether to allow a potential intervenor the opportunity to participate . . . depends on whether the prospective intervenor’s rights are already adequately represented in the litigation” and denying intervention in case challenging validity of ordinance where there was “no evidence in the record that the residents’ interests are not adequately represented by the Town government”); cf. G2003B, LLC v. Town of Weare, 153 N.H. 725, 726 (2006) (noting that trial court allowed town residents to intervene to defend validity of ordinance where town admitted it did not intend to provide a “vigorous defense of the action”).

² Additionally, NHRSC’s filings to date have not been particularly enlightening. For instance, NHRSC claims in its motion to intervene that SB 418 “creates a procedure by which state and local election officials can designate and identify ballots cast by those who register on election day and fail to provide documentary proof of their residency, identity, or state citizenship—each of which is indisputably an essential qualification for exercising the right to vote in New Hampshire.” (NHRSC’s Mot. at 2 (emphases added).) But that is simply not true. SB 418 only affects the voter’s need to establish proof of identity, not any other registration requirement. In addition, SB 418 appears to affect all voters—not just those registering on election day. The Court further notes that NHRSC’s joinder in the defendants’ motion to dismiss, (see Court Doc. 23), which was improperly filed before it was even allowed to intervene, is only one sentence and simply states that it “joins” in the defendants’ motion to dismiss with no additional analysis whatsoever, making it. Given NHRSC’s potential misunderstanding of SB 418 and that its substantive filings to date merely adopt the defendants’ existing arguments, is further basis to question whether its participation in this manner would be helpful.

Brenda Barnard

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