

THE STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS.
SOUTHERN DISTRICT

SUPERIOR COURT
Docket #226-2022-CV-00233
Docket #226-2022-CV-00236

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

and

Manuel Espitia, Jr.; and
Daniel Weeks

v.

David M. Scanlan,
Acting New Hampshire Secretary of State

and

John Formella
New Hampshire Attorney General

INTERVENOR'S REPLY IN SUPPORT OF MOTION TO INTERVENE

The New Hampshire Republican State Committee (“NHRSC”) submits this reply in support of its motion to intervene.

I. Introduction

Without betraying any evident irony, the plaintiffs suggest that as two “nonpartisan” organizations and five individuals they have a greater interest in whether SB 418 survives constitutional review in the courts than an organization representing the interests of hundreds of thousands of registered Republican voters in the state and the over four hundred members of the NHRSC whose election is entirely dependent on the validity of the votes cast in the state

primary. Similarly, having explicitly relied in their complaints upon the fact that SB 418 passed entirely on a party-line vote, the plaintiffs protest nevertheless that allowing the party allegedly responsible for “disproportionately burden[ing] young voters, student voters, mobile voters, low-income voters, disabled voters, and homeless voters” (Obj. at 12 n.8) to intervene would impermissibly “insert” partisan politics into what is a nonpartisan dispute. *Id.* at 9.

Plaintiffs attempt to skirt the grounds for intervention stated in the motion by reciting throughout the objection that NHRSC’s asserted rights are somehow too vague to be cognizable, apparently on the theory that repetition overcomes a statement’s inaccuracy. The objection also obscures New Hampshire’s liberal intervention standard behind a patchwork of both inapposite federal law and at least one standard apparently of plaintiffs’ own device. As a last resort, plaintiffs seek a discretionary denial of intervention based on their supposition that the NHRSC retained its counsel for the purpose of disqualifying the presiding justice and that counsel was complicit in the ploy. Aside from the insupportable speculation about the motives of the NHRSC and its counsel underlying this argument, in this case the premise of plaintiffs’ theory is false because the NHRSC and its counsel have no reason to think that Judge Temple could not fairly hear this case and they were unaware of who had been assigned to the case when the motion to intervene was filed.

II. Statement of Facts

Rather than confront the actual grounds on which the NHRSC has sought intervention, plaintiffs set up straw man characterizations of the NHRSC’s interests and then attack them as insufficient. See, e.g., Obj. at 1 (motion makes “glancing[]” reference to NHRSC’s interests), 4 (“sparse” explanation in motion of NHRSC’s interests), 6 (motion “passingly alludes” to “other interests”), and 9 n. 5 (NHRSC “does not even allege it has formal members”). To reiterate, the

NHRSC's direct and apparent interests are in (1) ensuring that none of the votes of the hundreds of thousands of registered Republicans it represents are cancelled by a vote of a person who cannot satisfy the requirements of SB 418, (2) ensuring that only qualified voters can participate in the election of delegates, who ultimately elect the NHRSC's members that comprise its governing body, and (3) preventing the NHRSC from being forced to devote resources to re-educate its volunteers, staff, and candidates regarding changes to the law were it invalidated by this litigation.

In their response brief, plaintiffs choose not to address the actual interest asserted by the NHRSC on behalf of registered Republicans. It is not, as plaintiffs would have it, "a generic interest in fair and free elections" (Obj. at 5) or a non-specific interest in the integrity of the election process (*id.* at 6). In fact, the NHRSC's interest is analogous to the interest plaintiffs themselves allege, namely preventing the disenfranchisement of individual voters. Plaintiffs' theory is that the procedures enacted by SB 418 will unreasonably burden certain prospective voters and thereby discourage them from exercising their right to vote. Obj. at 3. The rights of the prospective voters that plaintiffs claim to represent, however, are not superior to those of registered Republicans.¹ While it is true that unreasonably burdening same-day registration so that otherwise qualified voters are discouraged from registering can result in a deprivation of the right to vote, other qualified voters have an exactly equivalent interest in ensuring that those who are unqualified to vote do not cancel their votes. In both cases, an individual's right to vote has been functionally defeated. Registered Republican voters have an interest that is in direct competition with the interest plaintiffs assert in their complaint, and plaintiffs have conceded that

¹ The implicit premise of plaintiffs' claim is that the persons likely to be disenfranchised by SB 418 would not vote for Republican candidates. Obj. at 2 and 12 n. 8. While it is unclear on what basis plaintiffs can make such a sweeping generalization, to the extent their claims are predicated upon it they amount to an effort to counteract Republican votes.

political parties have standing to assert the rights of their members who may be injured. Obj. at 9 n.5.

Plaintiffs also gloss over the NHRSC's separate interest in preserving the integrity of the statutory procedure by which its members are selected. As noted in the motion to intervene, the members of the NHRSC are distinct from the universe of registered Republican voters. Motion to Intervene at 5. As plaintiffs put it, the "NHRSC's members are selected at caucuses by delegates who are elected in intra-party primaries governed by New Hampshire's election laws (including, SB 418)." Obj. at 6; see also NHRSC Bylaws Art. V, 1, 1 (NHRSC uses statutory procedure to elect its members by delegates) and Art. V, 3, 1 (state committee members elected at caucuses by party nominees and party delegates selected in state primary) found at <https://www.nh.gop/bylaws> (last visited 9-22-22). Through statute and bylaws, the members are the governing body of the NHRSC. RSA 667:22; see also NHRSC Bylaws Art. I, 1 ("The State Committee shall have the ultimate responsibility for all of the affairs of the Republican Party in the State of New Hampshire.") found at <https://www.nh.gop/bylaws> (last visited 9-22-22). Plaintiffs complain that the NHRSC does not adequately explain the mechanism by which invalidation of SB 418 could affect the fairness of the election of delegates or call the results of party caucuses into question (*id.*), but that is self-evident. If a prospective primary voter fails to qualify under SB 418, then that individual will not have the right to cast a ballot in the primary. If SB 418 is constitutional, then that person had no right to vote for a Republican Party delegate. The legitimacy of the party caucuses at which the NHRSC members are elected depends directly on whether the delegates were elected by qualified Republican voters, and the NHRSC therefore has a direct interest in ensuring that only qualified individuals vote in the primary.

Plaintiffs' objection also turns on their repeated assertion that the NHRSC cannot be adversely affected by the invalidation of SB 418 because before the enactment of that legislation New Hampshire elections were "high-turnout, secure, and fraud-free." Obj. at 4; see also *id.* at 2. Plaintiffs' allegation that New Hampshire's elections have been "fraud-free" does not establish that proposition as a factual matter. Plaintiffs tacitly concede in their complaints that by "fraud-free" they do not mean free of all fraud. The 603 Forward plaintiffs allege that "Republicans [have] repeatedly admitted that voter fraud in New Hampshire is *virtually nonexistent*" and "*little* actual election fraud exists in New Hampshire," and the Espitia plaintiffs likewise assert that "voter fraud is *extremely rare* in New Hampshire." 603 Forward, et al. Complaint (6/17/22) at 22, 25; Espitia, et al. Complaint (6/21/22) at 5 (emphasis supplied).²

Finally, plaintiffs suggest that the NHRSC should be denied intervention because it retained its counsel " 'with the sole or primary purpose of causing the recusal of the judge.' " Obj. at 14 (citing authorities; citations omitted). Plaintiffs offer nothing beyond their cynical speculation to substantiate this serious allegation. By contrast, the attached affidavit of counsel (Exhibit B) establishes that he has represented the NHRSC periodically for decades, that he has substantial experience in election law as a result, that he was approached about representing the NHRSC before these actions were even filed, that neither he nor the NHRSC knew Judge Temple had been assigned to this case when the motion to intervene was filed, that as a matter of

² The New Hampshire Attorney General's Office is tasked with enforcing the state's election laws, and publicly posts information regarding enforcement actions taken against wrongful voting. N.H. Office of the Attorney General, *Election Law Publications and Forms* (2022), <https://www.doj.nh.gov/election-law/publications.htm>. (last visited Sept. 16, 2022). In recent years, there have been multiple documented instances of wrongful voting. *See, e.g.* Excerpt of Election Law Status Report, July 1, 2021, to December 31, 2021, Exhibit A. Unless the court is prepared to discount the official record of NHDOJ's enforcement activities, it cannot accept plaintiffs' bald assurances that New Hampshire elections have been "fraud-free."

professionalism he would not enter an appearance to bring about the disqualification of a judge, and that he would not attempt to exploit a friendship as plaintiffs allege.

III. Argument

As plaintiffs acknowledge, the New Hampshire Supreme Court has articulated a straightforward and liberal test for intervention. If the moving party has an interest in the litigation that is “direct and apparent” and that interest would suffer or be sacrificed if intervention were denied, the court should grant intervention. Obj. at 4 (quoting *Snyder v. N.H. Savings Bank*, 134 N.H. 32 (1991); *Brzica v. Trustees of Dartmouth College*, 147 N.H. 443, 446 (2002) (intervention should be granted if standard met). The New Hampshire standard for intervention has the salutary effect of enabling all interested parties to come before the court and be heard before there is a decision on the merits. It promotes finality and judicial efficiency by encouraging interested parties to participate in one proceeding rather than sitting on claims and bringing them separately at some future time. It is difficult to justify such a waste of resources associated with sequential actions by parties with separate interests.

Apparently dissatisfied with the uncomplicated New Hampshire standard, plaintiffs seek to graft onto it restrictions employed in federal law under the more rigorous standard for intervention prescribed by Fed. R. Civ. P. 24(a)(2), see *Public Serv. Co. of N.H. v. Patch*, 136 F.3d 197, 204 (1st Cir. 1998) (detailing the four-factor federal standard for intervention as of right)), as well as at least one standard apparently of plaintiffs’ own formulation. Among these inapplicable federal standards are the requirements that prospective political party intervenors

show that the issues in the case place at risk their ability to win elections³ (Obj. at 8-9), that the NHDOJ does not “adequately represent” the intervenor’s interests (*id.* at 10), that the interests asserted by the intervenor must not be “common to ‘all citizens’ ” (*id.* at 11), and that the intervenor’s participation will “enhance” the state’s defense (*id.* at 10 n.6). Plaintiffs also suggest that to be granted intervention the NHRSC’s interest must be “unique” (*id.* at 5 and 10) but they cite nothing to support the use of this standard, and it is inconsistent with the outcome in *Snyder*. *Snyder v. N.H. Sav. Bank*, 134 N.H. 32, 34 (1991) (superior court’s denial of intervention reversed despite intervenor seeking the same relief under the same statute as plaintiff).

For these reasons, among others, the plaintiffs’ reliance on *Libertarian Party of N.H. v. Gardner*, 126 F. Supp. 3d 194 (D.N.H. 2015), is misplaced. There, Judge Barbadoro denied the RNC’s motion to intervene because he determined that the Attorney General’s office, representing the state’s interest, was identical to the RNC’s interest, and thus *under the federal rule* intervention should be denied. Plaintiffs’ Response (9/12/22), Exhibit C at 5. Further, *Libertarian Party* dealt with the national RNC seeking intervention, not the NHRSC, a state political committee organized under and bound by the laws of New Hampshire, with its distinct rights and interests under those laws. *Id.* New Hampshire law, in contrast to federal law, does not embrace this standard of exclusion based on uniformity of interests, instead focusing on whether a party has an interest and right at stake in the ongoing litigation. *Lamarche v. McCarthy*, 158

³ Plaintiffs characterize this as a “competitive injury,” although they do not establish that this is terminology used by the courts. In any event, contrary to plaintiffs’ assertion, NHRSC’s motion to intervene expressly notes that many New Hampshire elections are decided by very narrow margins (Motion at 2) and that the vote of just one unqualified voter can therefore affect the outcome of a race. The fewer votes cast in a race the more pronounced this risk becomes which makes it a particular concern in the election of Republican delegates in state primary elections. As down-ballot races they draw far fewer votes than the races at the top of the ticket. Hence, the NHRSC has plainly illustrated how its electoral prospects and its membership can differ depending on whether SB 418 remains the law.

N.H. 197, 201 (2008). This standard and analysis were not discussed in *Libertarian Party* because it is not the controlling standard in federal court. As a result, *Libertarian Party* is neither controlling nor persuasive here. See *American Federation of Teachers, et al. v. Gardner, et al.*, Docket No. 218-2020-CV-0570, at 6, N.H. Super. Ct. (Sept. 4, 2020) (granting intervention under the state law standard despite “shared positions and arguments between the intervenors and defendants[.]”). Under New Hampshire’s standard for intervention, it is immaterial that the intervenor’s right be held by all citizens (and it is puzzling that plaintiffs – whose complaints rely entirely upon rights held in common by all New Hampshire citizens – would suggest that this deprives a party of standing), that NHDOJ is defending the case, or that the intervenor will not somehow “enhance” the state’s defense. Because the NHRSC has met the New Hampshire standard for intervention it would be error to deny the motion to intervene.

Moreover, NHRSC’s actual interest would be adversely affected by voter fraud if SB 418 is invalidated. Despite plaintiffs’ assertions that New Hampshire’s elections are “fraud free,” even plaintiffs admit what they mean is that election fraud is “virtually nonexistent,” “extremely rare,” and that “little actual fraud exists in New Hampshire.” 603 Forward, et al. Complaint (6/17/22) at 22, 25; Espitia, et al. Complaint (6/21/22) at 5. Of course, plaintiffs’ conflicting arguments implies their belief that there is a tolerable level of voter fraud. While plaintiffs are at liberty to try to persuade the court on the merits that new voter qualification measures cannot be adopted against a background of what they consider to be de minimis violations of the right to vote, they are not entitled to have the court deny NHRSC intervention based on these dubious and unproven assertions.

Finally, plaintiffs’ bare allegations about the motives of the NHRSC and its counsel do not provide grounds to deny intervention. Plaintiffs have offered no evidence that counsel

entered an appearance primarily or solely to disqualify the presiding judge, and the evidence submitted with this reply establishes that the identity of the judge played no part in the retention of counsel or his appearance on behalf of the NHRSC.

IV. Conclusion

In accordance with the foregoing, the NHRSC respectfully requests that the court grant its motion to intervene.

Respectfully submitted,

NEW HAMPSHIRE REPUBLICAN
STATE COMMITTEE,
By Its Attorneys.

Date: 9/22/22

By: /s/ Bryan K. Gould
Bryan K. Gould, Esq. (NH Bar #8165)
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Morgan G. Tanafon, Esq. (NH Bar #273632)
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(603) 224-7761

CERTIFICATE OF SERVICE

I hereby certify that the within pleading is being served electronically through the court's ECF system upon counsel of record and all other parties who have entered electronic service contacts in this case.

Date: 9/22/22

/s/ Bryan K. Gould
Bryan K. Gould, Esq.

EXHIBIT A
(Excerpt)

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STATE OF NEW HAMPSHIRE

DEPARTMENT OF JUSTICE

SENATE COMMITTEE ON ELECTION LAW AND MUNICIPAL AFFAIRS

HOUSE COMMITTEE ON ELECTION LAW

Election Law Complaint Status Report

Submitted Pursuant to RSA 7:6-c

Reporting Period July 1, 2021, to December 31, 2021

Issued September 1, 2022

Prepared by:

John M. Formella
Attorney General

Myles B. Matteson
Deputy General Counsel
Election Law Unit
Attorney General's Office
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Concord, NH 03301
(603) 271-3650

B. Complaints Received by Type of Complaint

Type of Complaint	RSA Violations	Number of Complaints
Alleged Wrongful Voting	RSA 654:1 (Temporary Absence); RSA 654:12 (domicile); RSA 659:34 (Wrongful Voting)	1
Alleged Illegal Campaign Activity	RSA 659:21 (guardrail); RSA 659:40 (voter intimidation); RSA 659:43 (distributing campaign materials at polling place); RSA 659:44-a (electioneering by public employee); RSA 664:14 (political advertising disclosure requirements); RSA 664:16 (political advertising identification); RSA 664:17 (placement and removal of political advertising)	14
Alleged Election Official Misconduct	RSA 654:8 (voter ward placement); RSA 659:27 (challenge voter affidavit); RSA 669:6 (qualification of officer).	3
Alleged Campaign Finance Violation	RSA 664 (limitations on expenditures)	1
Election Review & Follow-Up	RSA 659:98 (delivery of ballots)	1
TOTAL:		20

EXHIBIT B

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AFIDAVIT OF BRYAN K. GOULD

1. I am counsel to the New Hampshire Republican State Committee (“NHRSC”) which has sought intervention in this case.

2. I have been general counsel for the NHRSC periodically for over 25 years under numerous chairs of the party. I do not currently serve as the NHRSC’s general counsel, however.

3. I have substantial professional experience in election law, having done work in that field since the 1990s. Shortly after the passage of SB 418 I was approached about seeking intervention on behalf of the Republican Party when there were press reports that there would be a challenge to the law. At the time the litigation was only threatened and had not yet been filed.

4. I thereafter learned that this action had been filed in the Hillsborough Superior Court – South. When my colleagues and I prepared and filed the motion to intervene I was

unaware that Judge Temple was the presiding justice; indeed, the only document I have seen to that effect is the plaintiffs' objection to the motion to intervene.

5. The plaintiffs' objection suggests that I have appeared in the case either intentionally to disqualify Judge Temple or as some other form of "gamesmanship."

6. The tacit assumption underlying plaintiffs' argument is that I have reason to believe that Judge Temple would tend to rule in favor of the plaintiffs. In fact, I have no reason to believe that Judge Temple is predisposed in any way in this case.

7. The only reason that I made an appearance in this case is that I was retained to represent the NHRSC in the court plaintiffs selected. I would never file an appearance in a case to bring about the recusal of any judge, much less attempt to exploit my personal relationship with a judge to gain some perceived advantage for my client.

FURTHER AFFIANT SAYETH NAUGHT.

Date: September 22, 2022

/s/ Bryan K. Gould
Bryan K. Gould

STATE OF NEW HAMPSHIRE
COUNTY OF MERRIMACK

Personally appeared the above-named Bryan K. Gould, on the 22nd day of September, 2022, and acknowledged the foregoing affidavit to be true, accurate and complete to the best of his knowledge and that his acknowledgment was his free act and deed.

Date: September 22, 2022

/s/ Brenda M. Barnard
Notary Public/~~Justice of the Peace~~
Name: Brenda M. Barnard
My Commission Expires: 2/3/2026

BRENDA M. BARNARD STATE OF -MY- COMMISSION EXPIRES FEBRUARY 3, 2026 NEW HAMPSHIRE NOTARY PUBLIC
