

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

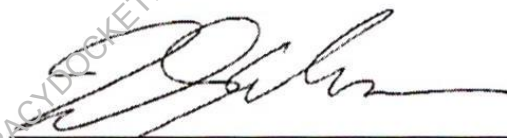
Pursuant to Superior Court Rule 15, "Any person shown to be interested may become a party to any civil action upon filing and service of an Appearance and pleading briefly setting forth his or her relation to the cause." Although intervention "in pending litigation in this state has been rather freely 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.