STATE OF NEW HAMPSHIRE

HILLSBOROUGH,
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. THOMPSON

and

MANUEL ESPITIA, JR.; and
DANIEL WEEKS

Plaintiffs

v.

DAVID M. SCANLAN, Acting New Hampshire Secretary of State;
and JOHN M. FORMELLA, New Hampshire Attorney General

Defendants

603 FORWARD PLAINTIFFS' RESPONSE TO NEW HAMPSHIRE REPUBLICAN STATE COMMITTEE'S MOTION TO INTERVENE

INTRODUCTION

This lawsuit concerns challenges to recently enacted Senate Bill 418 ("SB 418"), a law that introduces an unprecedented (and unconstitutional) provisional "Affidavit Ballot" into New Hampshire election law that will disenfranchise voters; cause longer lines at polling places; burden election workers; delay delivery of absentee ballots to overseas and military voters; and violate voter privacy by permitting election officials to review how individuals cast their ballots. The Defendants—Secretary of State David Scanlan and Attorney General John Formella—are actively defending the new law, including by recently filing a motion to dismiss.

The New Hampshire Republican State Committee ("NHRSC") now seeks to intervene to defend the law alongside the named Defendants. It acknowledges "the State of New Hampshire will defend the law," but insists it possesses "distinct rights and interests" from the State. *See* Mot. to Intervene at 2. Its motion, however, is short on precisely what those "distinct" interests are. NHRSC points chiefly to its supporters' interest in protecting their right to free and fair elections under the New Hampshire Constitution. That is no doubt an important right—and one the 603 Plaintiffs seek to vindicate in their lawsuit—but NHRSC fails to explain how that right will be jeopardized if it is not permitted to defend SB 418 alongside the state, or if SB 418 is ultimately enjoined. Nor could it—SB 418 represents a major deviation from longstanding New Hampshire law under which the state has held many free and fair elections. NHRSC's mere invocation of the right to free and fair elections—a right held in common by all New Hampshire voters—is not enough to justify its intervention, particularly when the state is already defending the law on behalf of citizens who support it. While NHRSC glancingly points to other interests, none supply the "direct and apparent" interest that would "suffer" or be "sacrificed" if intervention is denied, as New Hampshire law requires. *Snyder v. N.H. Sav. Bank*, 592 A.2d 506, 507 (N.H. 1991).

NHRSC's motion should also be denied because it threatens to disrupt this litigation by introducing another party into the action that will necessarily complicate the matter. The appearance of NHRSC's counsel of record for the state in earlier litigation challenging another New Hampshire voter registration law caused the Presiding Judge to disqualify to avoid an appearance of impropriety. This significantly delayed the proceedings. And here, NHRSC is not even an original or necessary party to this case. Even if NHRSC does not intend its choice of counsel to impose unnecessary delay, it almost certainly will. The likelihood of delay provides yet another reason to deny NHRSC's motion to intervene, as such intervention would unjustifiably disrupt the progression of the lawsuit just months before the new law goes into effect.

BACKGROUND

New Hampshire has a proud history of high-turnout, fraud-free elections. For the last several presidential elections, New Hampshire consistently ranked as one of the top states for voter turnout. One reason for this success is that, for decades, New Hampshire has permitted individuals to register to vote on election day at their polling site. Compl. ¶ 51. Registrants unable to present photo identification on election day were permitted to register by executing a "qualified voter affidavit" attesting to their identity, citizenship, and age. *Id.* ¶ 52 (citing RSA 654:12, I(a)-(b), (c)(2)(A) (2010)). Such registrants were required to have their photographs taken by election officials and their affidavits were subsequently verified. *Id.* (citing RSA 654:12, I(c)(2), III-a (2010)). Under this system, in Governor Sununu's words, New Hampshire's elections were "secure, safe, and reliable". Compl. ¶ 1.

Nonetheless, in response to unfounded claims of voter fraud in the 2016 and 2020 presidential elections, the New Hampshire General Court recently enacted SB 418 on a strictly party-line vote. Compl. ¶ 3. Under SB 418, same-day registrants who previously could have

registered through a qualified voter affidavit must now cast an unprecedented "Affidavit Ballot." Compl. ¶ 55 (citing SB 418, § 2). These are not ordinary ballots: they are segregated from all other ballots and counted only a provisional basis, subject to the voter's ability to cure through a cumbersome verification process likely to disenfranchise many voters who cast Affidavit Ballots. *Id.* ¶¶ 55-61. Worse still, Affidavit Ballots are specifically marked by election officials, allowing them to review how the voter cast their ballot after the fact. *Id.* ¶¶ 87-98. SB 418 goes into effect on January 1, 2023. *Id.* ¶ 71.

SB 418 is unconstitutional, and for that reason Plaintiffs—two organizations and three individuals ("603 Forward Plaintiffs")—filed suit shortly after the law was enacted. *See 603 Forward, et al. v. Scanlan, et al.*, Case No. 226-2022-CV-00233, Index No. 1 (N.H. Super. Ct. June 17, 2022) (lead case). They assert that SB 418 violates a host of guarantees under the New Hampshire Constitution, including the rights to free and fair elections, equal protection, due process, and privacy. *Id.* ¶¶ 114-140. They further allege SB 418 violates election administration rules mandated by the New Hampshire Constitution. *Id.* ¶ 141-149. The 603 Forward Plaintiffs were quickly joined by two other individual plaintiffs who also allege that SB 418 violates the right to privacy under the New Hampshire Constitution. *See Espitia, et al. v. Scanlan, et al.*, Case No. 226-2022-CV-00236, Index No. 1 (N.H. Super. Ct. June 21, 2022). These two cases were consolidated, and Defendants have since moved to dismiss both. *See* Case No. 226-2022-CV-00233, Index Nos. 8-10.

ARGUMENT

I. NHRSC has failed to identify a "direct and apparent" interest in the litigation that will "suffer" or be "sacrificed" absent intervention.

Superior Court Rule 15 permits a person "to become a party to any civil action" provided they are "shown to be interested" in the action. N.H. Super. Ct. R. 15. A potential intervenor "must have a right involved in the trial and his interest must be 'direct and apparent.'" *Snyder*, 592 A.2d at 507. The party's interest in the litigation must be substantial enough that it "would suffer if not indeed be sacrificed were the court to deny the privilege" of intervention. *Id.* (quoting R. Wiebusch, 4 *New Hampshire Practice, Civil Practice and Procedure* § 176, at 129-30 (1984)). "It is within the trial court's discretion to grant intervenor status," and its decision "will not be overturned unless . . . the court abuse[s] its discretion." *Samyn-D'Elia Architects v. Satter Companies of New England, Inc.*, 624 A.2d 970, 972 (N.H. 1993) (affirming denial of intervention).

NHRSC has failed to identify any "direct and apparent" interest to warrant its intervention, never mind an interest that would "suffer" or be "sacrificed" absent intervention. Its sparse discussion of its interest in this case relies almost entirely on the interest its supporters have in their "equal right to vote" in "free" elections under the state constitution, along with their candidates' "equal right to be elected into office." *See* Mot. to Intervene at 5-6 (citing N.H. Const. pt. 1, art. 11). But NHRSC nowhere explains how its supporters' interest in free elections will be harmed, or even affected, if the 603 Forward Plaintiffs succeed in their effort to enjoin SB 418. Nor could it. As the 603 Forward Plaintiffs explained in their complaint, for decades New Hampshire "permitted individuals to register to vote on election day, even when they have been unable to present photo identification," Compl. ¶ 51, and the state has nonetheless enjoyed high-turnout, secure, and fraud-free elections over that time, *see id.* ¶¶ 1, 26-45. Accordingly, "although

[NHRSC] alleged an interest in the case . . . they failed to demonstrate that their rights were affected" by SB 418. *Town of Woodstock v. Wishart*, No. 2018-0690, 2019 WL 4165180, at *2 (N.H. Aug. 12, 2019) (affirming denial of intervention).

Relatedly, the constitutional rights NHRSC points to are common to *all* New Hampshire citizens, and NHRSC never explains how it uniquely will be affected by SB 418, relative to the citizenry at large.[1] *See* N.H. Const. pt. 1, art. 11 (noting "every inhabitant in the state" has the right to free elections and an "equal right to be elected into office"). NHRSC's inability to identify an interest specific to it weighs strongly against intervention because "an undifferentiated, generalized interest in the outcome of an ongoing action is too porous a foundation on which to premise intervention." *Pub. Serv. Co. of New Hampshire v. Patch*, 136 F.3d 197, 205 (1st Cir. 1998).[2] "After all, every [citizen] in New Hampshire . . . yearns" to uphold their constitutional right to vote and possesses a generalized interest in how the state's elections are conducted. *Id; cf. Lance v. Coffman*, 549 U.S. 437, 442 (2007) (explaining that an "undifferentiated, generalized grievance about the conduct of government" does not provide standing to bring an election law claim). NHRSC's generic interest in free and fair elections is not an interest "distinct" from one held by "the ordinary run of citizens." *Daggett v. Comm'n on Governmental Ethics & Election Pracs.*, 172 F.3d 104, 110 (1st Cir. 1999); *see also Towne v. Gardner*, No. 22-cv-342-SM, ECF

[1] Perhaps one reason NHRSC does not identify any direct impacts the law may have on them or their supporters stems from a misunderstanding of how SB 418 operates. NHRSC argues that SB 418 "help[s] ensure that only New Hampshire residents vote in the state's elections." Mot. to Intervene, pp. 1-2. But SB 418 imposes affidavit ballots on voters who do not have proof of *identity*, which is a separate qualification from domicile. Moreover, it is already the law in New Hampshire that all eligible New Hampshire voters are New Hampshire residents. *See Casey v. N.H. Sec'y of State*, 173 N.H. 266, 276 (2020) ("a person who has a New Hampshire 'domicile' under RSA 654:1 is necessarily a New Hampshire resident under RSA 21:6.").

[2] Although federal decisions such as *Patch* do not govern here, New Hampshire courts oftentimes look to federal decisions concerning rules of civil procedure as analytical aides. *E.g., Cantwell v. J & R Properties Unlimited, Inc.*, 924 A.2d 355, 358 (N.H. 2007).

No. 4 at 7, (D.N.H. Sep. 7, 2022) ("Allegations by a voter that a voting procedure 'hurt the "integrity" of the election process' is 'far too generalized to warrant standing'") (*quoting Hotze v. Hudspeth*, 16 F.4th 1121, 1124 (5th Cir. 2021)). That is not enough—intervention requires an interest that is "direct and apparent" and that will suffer or be sacrificed absent intervention. *See Snyder*, 592 A.2d at 507. NHRSC's mere invocation of its supporters' general constitutional right to free elections does not suffice, particularly given NHRSC's failure to explain how enjoining SB 418 will imperil or even affect such a right.[3]

NHRSC only passingly alludes to other interests, but each is insufficient for the same reasons discussed above. It explains that 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), "making their membership directly dependent upon the fairness of those elections." Mot. to Intervene at 5. But NHRSC again *nowhere* explains how the fairness of its intra-party contests will be affected if SB 418 is enjoined. NHRSC does not suggest, for example, that certain Republican candidates will receive an unfair advantage over others if SB 418 is enjoined, or that the accuracy of its caucus results will be called into doubt. Such arguments would be fanciful—New Hampshire's political parties have carried out successful primaries and caucuses for decades under long-existing law without issue. *See generally* Compl. ¶¶ 1-2, 26-45, 51-54. It is similarly not plausible that, if the 603 Forward Plaintiffs prevail, NHRSC will have to reeducate its member

[3] For similar reasons, it is irrelevant that the New Hampshire Constitution "explicitly mandates that only those who are 'domicile[d]' in the state are eligible to participate in . . . elections." Mot. to Intervene at 6 (quoting N.H. Const. pt. 1, art. 11). NHRSC never explains the consequence of that idle observation and, regardless, it does not supply NHRSC with a "direct and apparent" interest here. Even if NHRSC believes SB 418 is necessary to enforce that constitutional provision—despite decades of experience to the contrary—a mere "asserted right to have the Government act in accordance with law" is not a sufficient basis to confer standing, *Allen v. Wright*, 468 U.S. 737, 754 (1984), nor to supply a meaningful interest in this case.

about "the law applicable to voter registration and election day voting requirements necessitated by the court's judgment." Mot. to Intervene at 6. All the 603 Forward Plaintiffs seek is to enjoin SB 418 and to return New Hampshire's election day voting rules to where they have been for *decades*. *See* Compl., Prayer for Relief. NHRSC will not suffer if it is required to advise its volunteers and candidates about longstanding rules with which it is well-familiar. Indeed, because SB 418 goes into effect on January 1, 2023, NHRSC is presumably advising its volunteers and candidates *now* on those exact same rules for the forthcoming November 2022 election; it will not be harmed by having to continue providing that same guidance in the event SB 418 is enjoined.

Unable to point to any "direct and apparent" interest of its own in this case, NHRSC largely relies upon a lengthy string cite of federal cases purportedly showing that political parties "usually" may intervene in election law cases. *See* Mot. to Intervene at 4-5. But being a political party alone is not enough, and both state and federal courts routinely deny their intervention in election law cases when they have not sufficiently identified a direct and apparent interest in the litigation.[4] The federal cases cited by NHRSC simply highlight that political parties are not exempt from the need to meet that requirement. For example, *Issa v. Newsom* concerned a Republican-led challenge to

[4] *See, e.g.*, *Szeliga v. Lamone*, Case No. C-02-CV-21-001816, at *3-8 (Md. Cir. Ct. Feb. 16, 2022) (denying DCCC's motion to intervene); *Feehan v. Wis. Elections Comm'n*, No. 20-CV-1771-PP, 2020 WL 7182950, at *2 (E.D. Wis. Dec. 6, 2020) (denying Democratic National Committee's motion to intervene); *Yazzie v. Hobbs*, No. CV-20-08222-PCT-GMS, 2020 WL 8181703, at *3, *4 (D. Ariz. Sept. 16, 2020) (denying Republican Party's motion to intervene in voting rights case); *Common Cause R.I. v. Gorbea*, No. 1:20-cv-00318-MSM-L7DA, 2020 WL 4365608, at *3 n.5 (D.R.I. July 30, 2020) (explaining a previous denial of a motion to intervene by the Republican National Committee and Rhode Island Republican Party); *Democracy N.C. v. N.C. State Bd. of Elections*, No. 1:20CV457, 2020 WL 6591397, at *1 (M.D.N.C. June 24, 2020) (denying Republican National Committee and North Carolina Republican Party's motion to intervene in voting rights case); *One Wis. Inst., Inc. v. Nichol*, 310 F.R.D. 394, 399 (W.D. Wis. 2015) (denying intervention to Republican officials and voters); *Am. Ass'n of People with Disabilities v. Herrera*, 257 F.R.D. 236, 259 (D.N.M. 2008) (denying intervention motions by Republican entities seeking to defend restrictive election law).

California's vote-by-mail rules for the 2020 election during the COVID-19 pandemic. No. 2:20-CV-01044-MCE-CKD, 2020 WL 3074351, at *1 (E.D. Cal. June 10, 2020). Several Democratic Party entities successfully intervened by asserting "the rights of their members to vote safely without risking their health" and explained how the rules affected their "overall electoral prospects." *Id.* at *3. Similarly, in *New Georgia Project v. Raffensperger*, several Republican entities intervened by arguing that invalidating the law at issue "would impair their ability to elect their chosen candidates." No. 1:21-CV-01229-JPB, 2021 WL 2450647, at *2 (N.D. Ga. June 4, 2021). Nearly all of the cases cited to by NHRSC permitted intervention based upon such a competitive injury. *See, e.g.*, *Paher v. Cegavske*, No. 3:20-CV-00243-MMD-WGC, 2020 WL 2042365, at *2 (D. Nev. Apr. 28, 2020) (permitting intervention where plaintiffs' success would "disrupt" intervenors' effort to elect Democrats); *Thomas v. Andino*, 335 F.R.D. 364, 370 (D.S.C. 2020) (similar).

NHRSC, in contrast, does *not* identify any competitive harm traceable to SB 418's enforcement or non-enforcement. Nor could it, given that Republican candidates in New Hampshire have been able to compete on fair terms and regularly achieve electoral success prior to SB 418. Indeed, Republicans currently control both chambers of the General Court along with the Governor's office and Executive Council based on elections held before the enactment of SB 418. There is simply no reason to believe New Hampshire's elections will cease to be free and fair if, absent NHRSC's intervention, SB 418 is enjoined and the state returns to its longstanding election day rules. Instead, NHRSC points only to the general constitutional right to free and fair elections held by all New Hampshire voters and candidates. *See* Mot. to Intervene at 5-6. Courts reject generalized demands that "election laws [be] applied . . . fairly" as a basis for intervention. *N.C. Green Party v. N.C. State Bd. of Elections*, No. 5:22-CV-276-D, 2022 WL 3142606, at *9–

10 (E.D.N.C. Aug. 5, 2022) (permitting intervention based upon "competitive standing" and party's interest in "a competitive playing field," but rejecting interest in "fair" election laws). NHRSC's reliance on the Superior Court's order in *American Federation of Teachers v. Gardner*, Case No. 218-2020-CV-00570, Index No. 25 (N.H. Super. Ct. Sept. 4, 2020) ("*AFT* Order") (attached as Exhibit A), is therefore misplaced. The Court there relied on the Republican intervenors' purported interest in "advancing their overall electoral prospects," *id.* at 5, and concluded that enjoining the law at issue "*would work a direct harm* on the intervenors," generating "significant and legitimate interests that g[a]ve the intervenors standing to seek intervention in this case," *id.* at 6 (emphasis added). NHRSC points to no similar "direct [competitive] harm" here.[5]

And, unlike several federal cases cited by NHRSC, this is not a "mirror-image" case where a partisan entity's case for intervention is strengthened by the existing participation of its "direct counterpart[]" on the other side of the aisle. *Democratic Nat'l Comm. v. Bostelmann*, No. 20-CV-249-WMC, 2020 WL 1505640, at *5 (W.D. Wis. Mar. 28, 2020) (permitting RNC to intervene in part because DNC was named plaintiff). The 603 Forward Plaintiffs (and Espitia plaintiffs) are non-partisan organizations and individual taxpayers. *See generally* 603 Forward Compl. ¶¶ 9-20. Permitting NHRSC's intervention here would unnecessarily insert "partisan politics into an otherwise nonpartisan legal dispute." *Miracle v. Hobbs*, 333 F.R.D. 151, 156 (D. Ariz. 2019)

[5] NHRSC's citation to *N.H. Democratic Party v. Gardner, et al.*, Case No. 226-2017-CV-00432, (N.H. Super. Ct. Sept. 11, 2017) (attached as Exhibit B), is therefore irrelevant. The 603 Forward Plaintiffs do not dispute that political parties have standing to assert the rights of their members. But a political party's members must first be *injured* to provide the organization such standing. *Id.* at 7 (explaining NHDP made "allegations and arguments" similar to those in a case where its "members . . . will be prevented from voting by the new law" (citing *Crawford v. Marion Cnty. Election Bd.*, 472 F.3d 949, 951 (7th Cir. 2007)). NHRSC does not even allege that is has formal members, never mind that those members will suffer the equivalent of an Article III injury-in-fact absent intervention.

(denying intervention to several Republican legislators in election law case). NHRSC's page-long citation to unrelated and fact-specific federal decisions does not remedy its failure to identity a "direct and apparent" interest that will "suffer" absent intervention.

II. NHRSC is adequately represented by Defendants Scanlan and Formella.

Even if NHRSC had provided a plausible direct and apparent interest in this litigation, any such interest is already adequately protected by the named defendants—Secretary of State Scanlan and Attorney General Formella, who are sued in their official capacities and represented by the New Hampshire Attorney General's office. Defendants clearly intend to vigorously defend the law, having already moved to dismiss the two consolidated complaints in full. *See* Case No. 226-2022-CV-00233, Index No. 10, Mot. to Dismiss. NHRSC fails to identify any unique evidence or legal perspective that it will add to this capable defense of SB 418.[6] "[B]ecause the Attorney General is prepared to defend [SB 418] in its entirety . . . adequate representation is presumed" for two separate reasons. *Daggett*, 172 F.3d at 111. First, "adequate representation is presumed [because] the goals of the applicants are the same as those of the . . . defendant[s]." *Id.* (citing *Kneeland v. NCAA*, 806 F.2d 1285, 1288 (5th Cir. 1987); *Moosehead Sanitary Dist. v. S. G. Phillips Corp.*, 610 F.2d 49, 54 (1st Cir. 1979)); *see also In re Stapleford*, 156 N.H. 260, 264 (2007) (children have no due process right to intervene in their parents' divorce because their "interests are well protected by the existing process."). Second, it is further presumed that by

[6] NHRSC's dependence on *American Federation of Teachers* is again misplaced. The Court there permitted intervention after first concluding the intervenors risked "direct harm" absent intervention, and subsequently explained that "despite sharing a common purpose with the defendants," the intervenor would "enhance representation of an interest already asserted." *AFT* Order at 7 (quoting *Ohio Democratic Party v. Blackwell*, No. 2:04-cv-1055, 2005 WL 8162665, at *2 (S.D. Ohio Aug. 26, 2005)). In view of that, the Court concluded "the intervenors have a sufficiently direct and apparent interest in the outcome of this case to allow them to intervene." *Id.* But, on top of failing to identify a direct and apparent interest in this case, NHRSC has failed to explain how its participation will "enhance" the state's defense of the law.

"defending the validity of the statute," the government is "representing adequately the interests of all citizens who support the statute." *Id.* (citing *Patch*, 136 F.3d at 207). These unrebutted presumptions weigh strongly against permitting NHRSC's intervention here.

NHRSC insists it will represent the "distinct interests of Republicans in New Hampshire, many of whom will vote in future elections and be subject to the state's election laws and procedures, like SB 418." Mot. to Intervene at 6. But it never identifies what those "distinct" interests are beyond generally upholding SB 418—precisely what the named government Defendants seek to achieve. And NHRSC's claim is further belied by the fact that those few vague interests it puts forward are those held by "every inhabitant of the state." N.H. Const. pt. 1, art. 11; *see also* Mot. to Intervene at 5-6. Such rights, common to "all citizens," are precisely those the Attorney General's office is presumed to adequately represent. *Daggett*, 172 F.3d at 111; *see also T-Mobile Ne. LLC v. Town of Barnstable*, 969 F.3d 33, 39 (1st Cir. 2020) (collecting cases).[7]

Judge Barbadoro denied intervention to the Republican National Committee under similar circumstances in a federal case concerning the Libertarian Party's ballot access for the 2016 election. *See generally Libertarian Party of New Hampshire v. Gardner*, 126 F. Supp. 3d 194, 199 (D.N.H. 2015) (denying RNC's request to intervene as defendants), *aff'd*, 843 F.3d 20 (1st Cir. 2016). As he explained in his oral ruling, "the A.G.'s Office is representing the state's interest . . . [a]nd that interest is identical to [the RNC's] interest." *Libertarian Party of New Hampshire v. Gardner*, Case No. 14-cv-322-PB, ECF No. 61 at 4:7-10 (D.N.H. April 20, 2015). ("*Libertarian Party of New Hampshire* Tr.") (attached as Exhibit C). Accordingly, as here, "the Attorney General's office [wa]s quite well positioned to defend the constitutionality of the statute and is

[7] To be sure, political parties sometimes *may* have sufficiently distinct interests from governmental co-defendant to warrant intervention, *e.g.*, *N.C. Green Party*, 2022 WL 3142606, at *10, but NHRSC fails to identify any such distinct interest here.

able to protect the interests the Republican Party has advocated here." *Id.* at 25:17-26:5 (further noting the Attorney General's office was "defending the constitutionality of the statute" and "is quite skilled in matters of constitutional law"). The judge in that case noted the situation might be different if the RNC "wanted to make the argument" that it was "afraid [it] will lose votes to the Libertarian Party" if it was granted ballot access because that argument would be "particular to [the Republican] party and not a general interest that the public shares." *Id.* at 4:11-20. But the RNC disclaimed that argument and NHRSC has failed to meaningfully assert any such competitive injury here.[8]

For that same reason, NHRSC's reliance on the Supreme Court's recent decision in *Berger v. North Carolina State Conference of the NAACP* is misplaced. In that case, the NAACP challenged a voting law passed by the North Carolina state legislature over the Governor's veto. *See* 142 S. Ct. 2191, 2197-98 (2022). The leader of each house of the North Carolina legislature sought to intervene to defend the law alongside the state Attorney General's office. The *en banc* Fourth Circuit denied their request despite a state law that "empowered the leaders of its two legislative houses to participate in litigation on the State's behalf under certain circumstances." *Id.* at 2197 (citing N. C. Gen. Stat. Ann. § 1–72.2). The Supreme Court reversed, explaining courts could not "presume a full overlap of interests when state law more nearly presumes the opposite" by expressly allow state legislators to intervene. *Id.* at 2204. But the Court did not disturb the "presumption of adequate representation where a *member of the public* seeks to intervene to defend

[8] As in *New Hampshire Libertarian Party*, the NHRSC cannot bring itself to admit that it is concerned that enjoining SB 418—which will disproportionately burden young voters, student voters, mobile voters, low-income voters, disabled voters, and homeless voters, *see* Compl. ¶ 118—harms its electoral prospects. But as in *New Hampshire Libertarian Party*, the failure to raise that partisan argument means that NHRSC's interests are no different than those of the named Defendants. *See New Hampshire Libertarian Party* Tr. at 3:4-6:23 (citing *Daggett*).

a law alongside the government." *Id.* (emphasis added). "[B]y contrast, the legislative leaders [in *Berger* were] *among* those North Carolina ha[d] expressly authorized to participate in litigation to protect the State's interests in its duly enacted laws." *Id.* (emphasis in original). The New Hampshire legislature has not bestowed any special statutory right of intervention on NHRSC. Rather, it stands in the shoes of all other "member[s] of the public," and asserts interests, in turn, that are held in equal measure by all New Hampshire citizens. Because the named defendants are presumed to adequately represent the interests of all citizens who support upholding SB 418—including NHRSC and its supporters—the Court should deny intervention.

III. Granting intervention will substantially complicate and likely delay adjudication of this matter.

NHRSC's motion should fail for the reasons above—it has not identified a direct and apparent interest at stake in this litigation and its generalized interest in upholding SB 418 is already adequately represented by the named Defendants. But to the extent the Court considers NHRSC's request to intervene a close call, it should exercise its discretion to deny intervention to avoid any delay and prejudice from judicial recusal that NHRSC's intervention presents. NHRSC has identified nothing substantial that it would add to the litigation, yet involvement of an additional party, who will engage in discovery and briefing and argument, necessarily will complicate the matter and lead to delays. This is all the more so here, where NHRSC seeks to intervene represented by counsel whose appearance in *League of Women Voters of New Hampshire, et al. v. Gardner, et al.*, Case No. 226-2017-CV-00433 (N.H. Super. Ct. Oct. 22, 2018), caused the Presiding Judge in that matter, who is also the Presiding Judge here, to recuse due to their close relationship. *See generally id.*, Index No. 95, Order on Disqualification ("Order") (attached as Exhibit D).

There, the court considered a motion to disqualify counsel, recognizing that the New

Hampshire Supreme Court has held that, even in criminal matters, "[w]hen circumstances exist involving the selection of counsel with the sole or primary purpose of causing the recusal of the judge . . . the right to counsel of choice can be overridden." *State v. Gonzalez*, 173 A.3d 583, 588 (N.H. 2017) (quoting *In re BellSouth Corp.*, 334 F.3d 941, 956 (11th Cir. 2003)); *see also* Order at 10 (noting the Court "agree[d] with the plaintiffs that the right to select counsel in a civil case is not a constitutional right") (citing *Town of Bartlett v. Furlong*, 168 N.H. 171, 177 (2015)). The Court nonetheless chose not to disqualify counsel because "the plaintiffs concede[d] that Attorney Gould's appearance is not a dilatory tactic or filed to cause the recusal of the Court." *Id.* at 8. As a result, the Presiding Judge recused, significantly delaying the adjudication of the case. *Id.* at 12 (demonstrating briefing and consideration of motion to strike and recusal delaying proceedings more than five weeks).

In *League of Women Voters*, however, the party that counsel represented was an original and necessary party to the case. The same is not true here. NHRSC's intervention as presently represented will cause entirely unnecessary delay. And while no one disputes that Mr. Gould is well-qualified to handle this matter, permitting NHRSC to intervene and trigger recusal creates at least the appearance of gamesmanship. *See, e.g.*, *McCuin v. Tex. Power & Light Co.*, 714 F.2d 1255, 1264 (5th Cir. 1983) (observing a "litigant could in effect veto the allotment" of a case to a specific judge "and obtain a new judge by the simple expedient" of finding counsel who creates a conflict with the Court); *UCP Int'l Co. Ltd. v. Balsam Brands Inc.*, 261 F. Supp. 3d 1056, 1063 (N.D. Cal. 2017) (finding appearance of manipulation "outweigh[ed] any interest" litigant had in retaining specific firm "no matter how capable the firm"). This provides further reason to deny the motion to intervene in order to avoid undue delays and allow the prompt litigation of this case.

CONCLUSION

For the reasons above, the Court should deny NHRSC's motion to intervene.

Dated: September 12, 2022

Respectfully submitted,

_/s/_Steven J. Dutton_____

Steven J. Dutton
McCLANE MIDDLETON
900 Elm Street, 10th Floor
Manchester, NH 03101
(603) 628-1379
steve.dutton@mclane.com

Paul J. Twomey
TWOMEY LAW OFFICE
44 Ring Road
Chichester, NH 03258
paultwomey@comcast.net
(603) 568-3254

Aria C. Branch*
Christopher D. Dodge*
Henry Brewster*
Elena Rodriguez Armenta*
Raisa Cramer*
Marisa O'Gara*
ELIAS LAW GROUP LLP
10 G Street NE, Suite 600
Washington, DC 20002
Telephone: (202) 968-4490
abranch@elias.law
cdodge@elias.law
hbrewster@elias.law
erodriguezarmenta@elias.law
rcramer@elias.law
mogara@elias.law

Attorneys for Plaintiffs

* Admitted *Pro Hac Vice*

Certificate of Service

I hereby certify that on September 12, 2022, I served the foregoing through the Court's electronic filing system on all parties and counsel of record.

/s/ Steven J. Dutton
Steven J. Dutton

EXHIBIT A

The State of New Hampshire
Superior Court

Hillsborough—Northern District, SS.

AMERICAN FEDERATION OF TEACHERS, ET AL.

v.

WILLIAM GARDNER, ET AL.

No. 218-2020-CV-0570

ORDER ON MOTION TO INTERVENE

At issue is whether Donald J. Trump for President, Inc. and the Republican National Committee (hereinafter "the intervenors") should be allowed to intervene in support of certain statutes being challenged by the plaintiffs. The Court held a hearing on September 1, 2020. After considering the pleadings, arguments, and applicable law, the motion to intervene is GRANTED.

Facts and Procedural History

This summer, in response to the current pandemic and its anticipated impact on elections in this state, the New Hampshire legislature passed HB 1266, which expands the class of persons eligible to cast a vote by absentee ballot to include those who "by reason of concern for the novel coronavirus (Covid-19) disease" cannot register or vote in person. On July 17, 2020, Governor Sununu signed HB 1266 into law. Shortly after the law was signed, the American Federation of Teachers ("AFT") brought the present action, which seeks to enjoin enforcement of several statutes that set forth the procedure for absentee registration and voting. See Doc. 1 (Compl.).

On August 24, 2020, Trump and the RNC moved to intervene, arguing they have a direct and apparent interest in this case that would suffer if denied intervention. See Doc. 5 (Mot. Intervene). The AFT filed an objection to the motion to intervene, arguing that the intervenors lack such an interest. See Doc. 14 (Pl.'s Obj. Mot. Intervene).

Analysis

New Hampshire's Civil Rules of Procedure state that "[a]ny 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 . . . ." Super. Ct. Civ. R. 15 (formerly R. 139). "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. New Hampshire Sav. Bank, 134 N.H. 32, 35 (1991) (quoting R. Wiebusch, 4 New Hampshire Practice, Civil Practice and Procedure § 176 at 129–30 (1984)) (emphasis in original). Thus, the test for determining whether to allow a prospective litigant intervenor status has two elements: (1) the aspiring intervenor must have a direct and apparent interest to be vindicated through the court process and (2) the potential intervenor must have a right that is involved in the litigation already pending in court. For the reasons set forth below, the first element of intervenor status goes to the potential intervenor's standing to seek a judicial remedy. The second prong of the intervenor test is whether that prospective intervenor should be allowed to vindicate that legal or equitable interest in a case already pending in court between other parties.

Whether to grant or deny a motion to intervene is ultimately within the discretion of the Court. Lamarche v. McCarthy, 158 N.H. 197, 200 (2008) (quotation omitted).

A number of New Hampshire cases appear to suggest that a party seeking to intervene must establish that they have standing to do so. See Am. Fed'n of Teachers v. State, 167 N.H. 294, 299 (2015) (stating that "we assume, without deciding, that the non-individual plaintiffs have standing to be intervenors" in the case, when the parties failed to raise the issue on appeal); Prof'l Fire Fighters of N.H. v. State, 167 N.H. 188, 191 (2014) (concluding the same); G2003B, LLC v. Town of Weare, 153 N.H. 725, 728 (2006) ("[W]e assume without deciding that the intervenors have standing to contest the trial court's ruling."). By assuming that the parties did have standing before starting their analysis, the Supreme Court implied that the parties needed some degree of standing to continue in the case as intervenors. See also In re Keene Sentinel, 136 N.H. 121, 125 (1992) (finding that because a newspaper had standing to petition the trial court for records, it could intervene in a divorce case in which it was seeking records). More importantly, because standing is a prerequisite for subject matter jurisdiction, a court cannot allow a party to seek judicial relief without establishing that the party has standing under the New Hampshire Constitution. See Duncan v. State, 166 N.H. 630, 639-40 (2014).

The federal courts are split on the issue of whether a prospective intervenor must establish standing under Article III of the U.S. Constitution. See City of Chicago v. Fed. Emergency Mgmt. Agency, 660 F.3d 980, 984 (7th Cir. 2011) (citing cases). Generally, those courts which do not require an intervenor to have Article III standing reason that

so long as there is a "case or controversy" between the primary litigants, the potential intervenor does not need to establish it has independent standing to pursue a judicial remedy. See, e.g., Loyd v. Alabama Dep't of Corr., 176 F.3d 1336, 1339 (11th Cir. 1999) ("we note that this circuit has held that a party seeking to intervene need not demonstrate that he has standing in addition to meeting the requirements of Rule 24 as long as there exists a justiciable case and controversy between the parties already in the lawsuit" (quotation omitted)).

This Court finds the analysis of the federal circuit courts that require Article III standing persuasive. As the Seventh Circuit succinctly explained:

> The cases that dispense with the requirement overlook the fact that even if a case is securely within federal jurisdiction by virtue of the stakes of the existing parties, an intervenor may be seeking relief different from that sought by any of the original parties. His presence may turn the case in a new direction—may make it really a new case, and no case can be maintained in a federal court by a party who lacks Article III standing.

Id. at 985 (citations omitted). As a general proposition, "[s]tanding under the New Hampshire Constitution requires parties to have personal legal or equitable rights that are adverse to one another with regard to an actual, not hypothetical, dispute, which is capable of judicial redress." Petition of Guillemette, 171 N.H. 565, 569 (2018) (quotation omitted).

The New Hampshire Supreme Court has set forth the following principles for courts to apply in determining whether a party has standing to seek judicial relief:

> [W]e focus on whether the party suffered a legal injury against which the law was designed to protect. 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. Rather, the party must show that its own rights have been or will be directly affected.

State v. Actavis Pharma, Inc., 170 N.H. 211, 215 (2017) (quotations omitted), cert. denied, 138 S. Ct. 1261 (2018).

The intervenors assert that their members include voters who have a vested interest in maintaining their "equal right to vote" in free and fair elections. Doc. 5 at ¶ 4; N.H. Const. Pt. 1, Art. XI. They also assert that their members include candidates with a vested interest in being elected, which is itself a fundamental right under the state constitution. See Akins v. Sec'y of State, 154 N.H. 67, 71 (2006) (finding Pt. 1, Art. 11 provides for both the right to vote as well as the equal right to be elected). They maintain that if the plaintiffs are successful in this case, the intervenors will lose "important safeguards that currently protect their 'equal right to vote.'" Doc. 5 at ¶ 4. The intervenors further argue that the plaintiffs' success would require them to devote time and resources to educate their members on changes to absentee voting procedures. Id. ¶ 7.

The AFT argues that "the Republicans' argument for intervening is nothing more than a partisan interest in maintaining what they believe to be an electorally favorable landscape in New Hampshire's current elections system." Doc. 14 at 4. However, political parties' interests in "advancing their overall electoral prospects" and "diverting their limited resources to educate their members on the election procedures" are "routinely found to constitute significant protectable interests." Issa v. Newsom, No. 2:20-cv-1055-MCE-CKD, 2020 WL 3074351, at *3 (E.D. Cal. June 10, 2020). Recently, the Democratic National Committee was permitted to intervene in an action in which the

plaintiffs were challenging a plan for an all-mail election for Nevada's June 9, 2020 primary. Paher v. Cegavske, No. 2:30-cv-243-MMD-WGC, 2020 WL 2042365 (D. Nev. April 28, 2020). The district court stated:

> Proposed Intervenors argue that Plaintiffs' success on their claims would disrupt the organizational intervenors' efforts to promote the franchise and ensure the election of Democratic Party candidates . . . . Proposed Intervenors have sufficiently shown that they maintain significant protectable interests which would be impaired by Plaintiffs' challenge to the Plan's all-mail election provisions.

Id. at * 2; see Thomas v. Andino, No. 3:20-cv-1552-JMC, 2020 WL 2306615, at *3 (D. S.C. May 8, 2020) (finding that the South Carolina Republican Party's "role as overseer of both the June 9 political party primary and the party's candidates demonstrates the sufficiency of the SCRP's interest relating to the subject of the action"); see also Doc. 5 at ¶ 1, n.1 (citing cases in which the RNC has been allowed to intervene).

Electing Republican candidates to office and ensuring high turnout of voters is clearly a prime function and interest of both the Republican National Committee and Donald J. Trump for President, Inc. Moreover, expending time and money to educate their constituents about changes in the law should the statutes be enjoined would work a direct harm on the intervenors. The Court finds these are significant and legitimate interests that give the intervenors standing to seek intervention in this case.

The AFT objects to intervention on the grounds that the interests of the Intervenors will be adequately addressed by the currently named defendants, as the State has an interest in defending the constitutionality of its statutes. While the Court acknowledges that there will likely be shared positions and arguments between the intervenors and the defendants, it does not find that this overlap serves as a basis to

deny intervention. "Although adequacy of representation by an existing party is a consideration, it is not dispositive, and the Court may permit a party to intervene if the presence of that party will enhance representation of an interest already asserted, or even when the intervenor's interests are completely and adequately represented by an existing party." Ohio Democratic Party v. Blackwell, No. 2:04-cv-1055, 2005 WL 8162665, at *2 (S.D. Ohio Aug. 26, 2005) (citing Eljer Mfg v. Liberty Mutual Ins. Co., 773 F. Supp. 1102, 1108 (N.D. Ill. 1991); Austell v. Smith, 634 F. Supp. 326, 335-35 (W.D. N.C. 1986)).

In Blackwell, the court noted that "[i]t is debatable whether the Ohio Republican Party has an interest in the outcome of the case which differs from the interest of either the Ohio Secretary of State or the respect County Boards of Elections." Id. Nevertheless, the court allowed the party to intervene, as "there is no dispute that the Ohio Republican Party ha[s] an interest in the subject matter of this case, given the fact that changes in voting procedures could affect candidates running as Republicans and voters who were members of the Ohio Republican party." Id. Here, this Court similarly concludes that despite sharing a common purpose with the defendants in this case, the intervenors have a sufficiently direct and apparent interest in the outcome of this case to allow them to intervene.

The AFT also argues that allowing intervention will result in needless delays in a case already significantly constrained by the fixed date of the November elections. However, at the hearing, counsel for the intervenors stated they would abide by the pleading schedule agreed to by the plaintiffs and defendants in this case. Particularly

given the likely overlap of legal arguments in support of the defendants' and intervenors' common goals, the Court is unpersuaded that the addition of the intervenors to this case will result in delays or further complication of the issues presented.

Conclusion

Consistent with the foregoing, the Court holds that the intervenors have sufficiently direct and apparent interests to intervene in this case. Consequently, the intervenors' motion to intervene is GRANTED.

SO ORDERED.

September 4, 2020
Date

Judge N. William Delker

Clerk's Notice of Decision
Document Sent to Parties
on 09/04/2020

EXHIBIT B

THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH
SUPERIOR COURT

Hillsborough Superior Court Southern District
30 Spring Street
Nashua NH 03060

Telephone: 1-855-212-1234
TTY/TDD Relay: (800) 735-2964
http://www.courts.state.nh.us

NOTICE OF DECISION

File Copy

Case Name: **New Hampshire Democratic Party v William M Gardner, et al**
Case Number: **226-2017-CV-00432** ***226-2017-CV-00433***

Enclosed please find a copy of the court's order of September 12, 2017 relative to:

ORDER ON PENDING MOTIONS

September 12, 2017

Marshall A. Buttrick
Clerk of Court

(293)

C: William E. Christie, ESQ; Suzanne Amy Spencer, ESQ; Anne M. Edwards, ESQ; Anthony J. Galdieri, ESQ; Bruce V. Spiva, Esq; Amanda Callais, Esq; John Devaney, Esq; Marc Elias, Esq

THE STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS
SOUTHERN DISTRICT

SUPERIOR COURT

Docket No. 2017-CV-00432

New Hampshire Democratic Party

v.

William M. Gardner, New Hampshire Secretary of State
Gordon MacDonald, New Hampshire Attorney General

Docket No. 2017-CV-00433

League of Women Voters of New Hampshire;
Douglas Marino; Garrett Muscatel; and Adriana Lopera

v.

William M. Gardner, New Hampshire Secretary of State
Gordon MacDonald, New Hampshire Attorney General

ORDER ON PENDING MOTIONS

The plaintiffs bring this action challenging the constitutionality of Senate Bill 3 ("SB 3"), a recently enacted law governing voter registration. The plaintiffs seek preliminary and permanent injunctive relief barring the law from taking effect. The defendants object and have filed an "emergency" motion to dismiss based on lack of standing. The Court held a hearing on the request for preliminary injunctive relief and the motion to dismiss on September 11, 2017, at which all parties appeared through counsel. The parties proceeded on offers of proof. After considering the arguments, the applicable law, and the record, the Court finds and rules as follows.

Background

The Court draws the following information from the record. On July 10, 2017, Governor Sununu signed SB 3, which modified the definition of domicile for voting

purposes and changed the requirements for documenting the domicile of a person registering to vote. In addition, SB 3 added new provisions to the voter fraud statute related to the voter registration process. The new law essentially divides the voter registration process into two categories: registrations occurring over thirty days in advance of an election and registrations occurring within thirty days of an election, including same-day registration. The Court will briefly review those provisions in turn.

Under SB 3, a person seeking to register to vote over thirty days in advance of an election is required to affirmatively prove his or her domicile "by providing documentation showing that the applicant has a domicile at the address provided on the voter registration form." RSA 654:2, II(d). Specifically, if the person has a: "(i) New Hampshire driver's license or identification card issued under RSA 260:21, RSA 260:21-a, or RSA 260:21-b; (ii) New Hampshire resident vehicle registration; (iii) a picture identification issued by the United States government that contains a current address; [or] (iv) government issued check, benefit statement, or tax document" then the person must present that document in order to register. RSA 654:12, I(c)(1)(A). If the person has any of those documents but fails to bring them, then they will not be permitted to register until they return with those documents. If the person "attests under penalty of voter fraud that he or she does not possess any of" those documents, the applicant "may present any reasonable documentation of having established a physical presence at the place claimed as domicile, having an intent to make that place his or her domicile, and having taken a verifiable act to carry out that intent." RSA 654:12, I(c)(1)(B). RSA 654:12, I(c)(1)(B) identifies a non-exclusive list of documents that may be used, such as a lease, utility bill, property purchase agreement, or perhaps even a piece of mail. See

RSA 654:12, I(c)(1)(B)(i)–(viii). Although not entirely clear from the plain language of the statute, it appears that if the applicant does not have such documentation at the time of registration, the person will not be permitted to register to vote. See RSA 654:12, II(c)(1). Previously, "if the applicant [did] not have reasonable documentation in his or her possession at the place and time of voter registration," he or she could file a domicile affidavit. RSA 654:12(c) (repealed effective September 7, 2017).

The registration requirements are different if the applicant is seeking to register within thirty days of an election. If the applicant does not have any "domicile" documents in his or her immediate possession at the time of registration, he or she may still register to vote. However, the applicant must elect one of two post-election verification options in order to register. First, if the applicant has documentation demonstrating his or her domicile, but does not have it with him or her at the time of registration, the person must agree to submit that documentation to his or her local clerk's office within ten days (thirty days if the clerk's office is open twenty hours per week or less) of registration. RSA 654:12, I(c)(2)(A). If the person does not return such documentation as promised, they are subject to a $5,000 civil fine, RSA 659:34, I(h), and prosecution for a Class A misdemeanor, RSA 659:34, II. Alternatively, if the applicant has no documentation of domicile (either on the day of election day or in general), he or she may "initial[ ] the paragraph on the registration form acknowledging that domicile may be verified." RSA 654:12, I(c)(2)(B). "The supervisors of the checklist" are then obligated, "as soon as practical following an election at which the person initials such paragraph to register and vote, attempt to verify that the person was domiciled at the address claimed on election day" using various methods. Id.

The plaintiffs contend that these new domicile requirements are "highly confusing, unnecessary, and intimidating hurdles to voting." (N.H. Democratic Party's Compl. ¶ 2.) They further allege that it will "disenfranchise eligible, lawful New Hampshire citizens," and "expose countless innocent voters to criminal and civil liability" for failing to comply with "burdensome paperwork requirements." (Id.) As a result, the plaintiffs maintain that SB 3 violates the right to vote guaranteed by Part I, Article 11 of the New Hampshire Constitution. The plaintiffs also claim that SB 3 is void for vagueness and violates the State Constitutional guarantee of equal protection. For their part, the defendants maintain that none of the plaintiffs in either case have standing and that the law does not violate any provision of the New Hampshire Constitution.

Analysis

I. Motion to Dismiss

"Generally, in ruling upon a motion to dismiss, the trial court is required to determine whether the allegations contained in the [plaintiffs'] pleadings are sufficient to state a basis upon which relief may be granted." K.L.N. Constr. Co. v. Town of Pelham, 167 N.H. 180, 183 (2014) (citation omitted). "To make this determination, the [C]ourt would normally accept all facts pled by the [plaintiffs] as true, construing them most favorably to the [plaintiffs]." Id. (citation omitted). "When the motion to dismiss does not challenge the sufficiency of the [plaintiffs'] legal claim but, instead, raises certain defenses, the trial court must look beyond the [plaintiffs'] unsubstantiated allegations and determine, based on the facts, whether the [plaintiffs] have sufficiently demonstrated their right to claim relief." Id. (citation omitted). "A jurisdictional challenge based upon lack of standing is such a defense." Id. (citation omitted).

"Similar to the 'case or controversy' requirement of Article III [of the Federal Constitution], standing under the New Hampshire Constitution requires parties to have personal legal or equitable rights that are adverse to one another with regard to an actual, not hypothetical, dispute, which is capable of judicial redress." Duncan v. State, 166 N.H. 630, 642–43 (2014) (citations omitted). "The requirement that a party demonstrate harm to maintain a legal challenge rests upon the constitutional principle that the judicial power ordinarily does not include the power to issue advisory opinions." Birch Broad., Inc. v. Capitol Broad. Corp., Inc., 161 N.H. 192, 199 (2010) (quotation omitted); see also Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992) (holding that a plaintiff must show that she suffered from an actual or imminent invasion of a legally-protected interest which is concrete and particularized in order to maintain standing).

Here, based on the pleadings and the brief offers of proof, the Court finds, at the very least, that plaintiff Adriana Lopera has standing to bring this action. When the constitutionality of a statute is at issue, the supreme court has, for nearly a century, held that "pleading and procedure in this jurisdiction has been a means to an end and it should never become more important than the purpose which it seeks to accomplish." Levitt v. Maynard, 104 N.H. 243, 244 (1962) (permitting individual voter to challenge constitutionality of senate districts). Therefore, the supreme court traditionally "granted taxpayers standing to raise constitutional issues by bringing declaratory judgment petitions." Grinnell v. State, 121 N.H. 823, 825 (1981) (citation omitted). Indeed, the supreme court has repeatedly held that "a petition for a declaratory judgment is particularly appropriate to determine the constitutionality of a statute when . . . the public need requires a speedy determination of important public interests involved therein." Boehner v.

State, 122 N.H. 79, 83 (1982) (quotation omitted). This case appears to fit squarely within that rubric.

Starting in Baer v. N.H. Dep't of Educ., 160 N.H. 727 (2010), however, the supreme court seemed to retreat from that general rule. It held that "taxpayer status, without an injury or an impairment of rights, is not sufficient to confer standing to bring a declaratory judgment action under RSA 491:22." Id. at 731. The supreme court therefore clarified that "[a] party will not be heard to question the validity of a law, or any part of it, unless he shows that *some right of his* is impaired or prejudiced thereby." Id. (quoting Asmussen v. Comm'r, N.H. Dep't of Safety, 145 N.H. 578, 587 (2000) (emphasis in original)). But, relevant here, the supreme court cited Asmussen with approval for the proposition that parties are "required to demonstrate [that] they were subject to [the] challenged statute to maintain [a] declaratory judgment action." Baer, 160 N.H. at 731 (citing Asmussen, 145 N.H. at 587). In this case, Ms. Lopera alleges that she is a new resident of Nashua, and that she has not yet registered to vote. The complaint makes clear that she wants to register to vote. When she attempts to register, she will undoubtedly be subject to the requirements and potential penalties imposed by SB 3. The fact that she may have a lease agreement does not change the fact that she will still be subject to SB 3. As such, under Baer and Asmussen, she has standing to challenge the statute under RSA 491:22 as an unregistered, but eligible voter who will be affected by SB 3 in the near future.

Moreover, the Court finds that the New Hampshire Democratic Party ("NHDP") has standing to proceed. As noted above, the New Hampshire Supreme Court has recognized that, "as a practical matter, Part II, Article 74 imposes standing requirements that are

similar to those imposed by Article III of the Federal Constitution." Duncan, 166 N.H. at 642. It therefore follows that Federal cases interpreting Article III's "case or controversy" requirement provide helpful and persuasive guidance in deciding this issue. Generally speaking, "political parties have standing to assert, at least, the rights of its members who will vote in an upcoming election." Fla. Democratic Party v. Detzner, No. 4:16cv607-MW/CAS, 2016 U.S. Dist. LEXIS 143620, at *9 (N.D. Fla. Oct. 16, 2016) (citation omitted). For instance, in 2007, the Seventh Circuit unanimously found that a new voter identification "law injure[d] the Democratic Party by compelling the party to devote resources to getting to the polls those of its supporters who would otherwise be discouraged by the new law from bothering to vote," and therefore the party had standing to sue. Crawford v. Marion Cnty. Election Bd., 472 F.3d 949, 951 (7th Cir. 2007) (citations omitted). As an alternative basis, the Seventh Circuit found that "[t]he Democratic Party also has standing to assert the rights of those of its members who will be prevented from voting by the new law." Id. (citations omitted). The United States Supreme Court affirmed. Crawford v. Marion Cnty. Election Bd., 553 U.S. 181, 189 n.7 (2008) ("We also agree with the unanimous view of those judges that the Democrats have standing to challenge the validity of SEA 483.").

In this case, NHDP makes similar allegations and arguments. Given the similarities between the Article III standing inquiry and New Hampshire's standing requirements, see Duncan, 166 N.H. at 642, the Court will, at least at this early stage of the litigation,[1] follow the guidance of the United States Supreme Court on this issue. See also Sandusky Cnty.

[1] In the interest of issuing an expedited order on this matter, the Court has not decided the standing of the other plaintiffs. To the extent necessary, the Court will address the remaining standing issues after a full evidentiary hearing, as discussed below. Likewise, the Court's decisions regarding the standing of NHDP and Ms. Lopera may be subject to change after a full evidentiary hearing.

Democratic Party v. Blackwell, 387 F.3d 565, 574 (6th Cir. 2004) (finding that Ohio Democratic Party had "standing to assert, at least, the rights of their members who will vote in the November 2004 election"). Accordingly, the Court finds that NHDP has standing bring this action.[2] The standing of Ms.Lopera and the NHDP confers standing on all parties to this action. For these reasons, the defendants' "emergency" motion to dismiss on standing grounds is DENIED.

II. Preliminary Injunction

"The issuance of injunctions, either temporary or permanent, has long been considered an extraordinary remedy." Murphy v. McQuade, 122 N.H. 314, 316 (1982). "A preliminary injunction is a provisional remedy that preserves the status quo pending a final determination of the case on the merits." DuPont v. Nashua Police Dep't, 167 N.H. 429, 434 (2015) (citation omitted). In order to obtain preliminary injunctive relief, the moving party must generally demonstrate: (1) a likelihood of success on the merits; (2) that "there is an immediate danger of irreparable harm to the party seeking injunctive relief"; and (3) that "there is no adequate remedy at law." N.H. Dep't of Envtl. Servs. v. Mottolo, 155 N.H. 57, 63 (2007). "[T]he granting of an injunction is a matter within the sound discretion of the Court exercised upon a consideration of all the circumstances of

[2] The defendants also argue that RSA 491:22 does not confer organizational standing as a matter of statutory interpretation. See Benson v. N.H. Ins. Guar. Ass'n, 151 N.H. 590, 593 (2004). Here, however, the Court need not decide that issue, because the Court finds that NHDP has alleged sufficient threats/injuries to its own interests apart from any individual injuries to its members. See Beaudoin v. State, 113 N.H. 559, 560 (1973) (explaining that RSA 491:22 "has been construed to encompass any act of the defendant which is sufficiently definite to constitute a genuine threat or prejudice to the plaintiff's interests"). This is therefore not strictly an organizational standing case, and thus, Benson does not control. Moreover, the defendants raised this argument for the first time at today's hearing. The Court is disinclined to decide this dispositive argument without first permitting the plaintiffs an opportunity to respond.

each case and controlled by established principles of equity." Dupont, 167 N.H. at 434 (citation omitted).

Before addressing the propriety of preliminary injunctive relief, the Court must comment on the nature of the hearing held on today's date. As previously stated on the record, this hearing was not a product of ideal scheduling. The Court, through no fault of the parties, could only schedule one three-hour block of time to hear arguments on the motion to dismiss and offers of proof on the motion for preliminary injunctive relief prior to the first election affected by SB 3 on September 12, 2017. Given this extremely short period of time, the Court heard what can only be described as rushed offers of proof. The offers of proof involved numerous witnesses, some of which were not even able to attend the hearing as is generally required. As a result, defendants were unable to perform cross-examination. The offers of proof also included the testimony of expert witnesses, to which the defendants objected on Daubert grounds. The parties also did not have any significant time to argue the preliminary injunction criteria listed above. Put simply, the Court cannot and should not decide these important constitutional issues based on *very* brief and contested offers of proof presented at a truncated hearing. This is particularly true when the Court is faced with issuing a decision in just under fifteen hours before the first election. The Court recognizes that it directed the parties to proceed on offers of proof, and perhaps the Court was overly optimistic that it could render a meaningful decision based on that procedure. However, after today's hearing it became clear to the Court that a full evidentiary hearing will be needed on this matter in order to decide the propriety of preliminary injunctive relief. Accordingly, the Court will schedule a full evidentiary hearing on the matter as the docket permits. The

Court would also be open to converting the preliminary injunction hearing to a final hearing on the merits if all parties consent.

Because the Court cannot fairly rule on the plaintiff's request for temporary injunctive relief, the Court will instead treat the plaintiff's request for preliminary injunctive relief as a request for a temporary restraining order until the propriety of preliminary injunctive relief can be properly litigated. "A temporary restraining order, or TRO, has been characterized as the entry of judgment without trial and is, for that reason, only sparingly issued." R. Wiebusch, 4 New Hampshire Practice, Civil Practice and Procedure § 19.13 (2017). "A temporary restraining order will be granted only to preserve the status quo against the threat of immediate and irremediable change." Id. "The granting or refusal of a restraining order rests in the sound discretion of the [t]rial [c]ourt under the circumstances and the facts of the particular case." Poisson v. Manchester, 101 N.H. 72, 75 (1957) (citation omitted). The trial court's "action cannot be arbitrary or capricious but must be controlled by established principles of equity." Id.

In deciding this issue, the Court is guided by two different principles. First, "[i]n reviewing a legislative act, [the Court] presume[s] it to be constitutional and will not declare it invalid except upon inescapable grounds." AFT—N.H. v. State, 167 N.H. 294, 300 (2015) (quotation omitted). "In other words, [the Court] will not hold a statute to be unconstitutional unless a clear and substantial conflict exists between it and the constitution." Id. (quotation omitted). "Thus, a statute will not be construed to be unconstitutional when it is susceptible to a construction rendering it constitutional." Id. (citation omitted). "When doubts exist as to the constitutionality of a statute, those doubts must be resolved in favor of its constitutionality." Id.

On the other hand, the right to vote is "fundamental." Guare v. State, 167 N.H. 658, 663 (2015). Part I, Article 11 of the New Hampshire Constitution provides in part:

> All elections are to be free, and every inhabitant of the state of 18 years of age and upwards shall have an equal right to vote in any election. Every person shall be considered an inhabitant for the purposes of voting in the town, ward, or unincorporated place where he has his domicile.

When voting rights "are subjected to severe [statutory] restrictions," the statute must be "narrowly drawn to advance a state interest of compelling importance." Id. Even when the statutory restriction is not "severe," it may be subject to so-called "intermediate level" scrutiny, under which "the State must articulate specific, rather than abstract state interests, and explain why the particular restriction imposed is actually necessary, meaning it actually addresses, the interest set forth." Id. at 667 (quotations omitted).

In the Court's view, at least for the limited purposes of a temporary restraining order, the new civil and criminal penalties established by SB 3, codified in RSA 654:12, I(c)(2)(A) and RSA 659:34 are "severe" restrictions on the right to vote. Based upon its time-constrained review of the record and the relevant law, the Court cannot find that these restrictions are "narrowly drawn" by any stretch of the imagination. There are simply too many unanswered questions at this stage in the litigation. For instance, what if a same-day voter has the required documents at home, swears he/she will provide them, but the voter then cannot get them to the clerk's office in time for one reason or another (such as illness, family emergency, or even a lack of a printer)? Under the plain language of the statute, it appears that such a voter will be subject to a $5,000 fine or even a year in jail for simply failing to return paperwork. The State's argument at the hearing today—that these harsh penalties would be saved by prosecutorial discretion—was unconvincing to say the least. The average voter seeking to register for the first

time very well may decide that casting a vote is not worth a possible $5,000 fine, a year in jail, or throwing himself/herself at the mercy of the prosecutor's "discretion." To the Court, these provisions of SB 3 act as a very serious deterrent on the right to vote, and if there is indeed a "compelling" need for them, the Court has yet to see it. Accordingly, the Court finds that the plaintiffs are entitled to a temporary order restraining the defendants from enforcing any of the new penalties associated with SB 3. Therefore, in the event any voter fails to provide documentation as required by RSA 654:12, I(c)(2)(A), the defendants are enjoined from seeking civil or criminal penalties.

While the Court has serious concerns regarding other parts of SB 3, the Court recognizes that the law is entitled a presumption of constitutionality. See AFT— N.H., 167 N.H. at 300. The Court therefore will not enter any additional temporary relief at this time. However, the Court does note that the defendants represented on the record, and Assistant Secretary of State Scanlon represented in his affidavit, that the Secretary of State's Office will make good-faith efforts to ensure that voters are properly informed of SB 3's requirements at tomorrow's election. This should include the fact that there are currently no penalties, pursuant to this order, for failing to return any documents in connection with same-day voter registration. The Court expects and trusts that the Secretary of State's Office will: (1) continue to make those efforts at any other elections during the pendency of this case or until this order is otherwise dissolved; (2) provide accurate information on its website; and (3) to the extent practicable, ensure that local cities and towns also provide accurate information regarding the registration process on their websites.

So ordered.

Date: September 12, 2017

Hon. Charles S. Temple,
Presiding Justice

EXHIBIT C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

LIBERTARIAN PARTY OF NEW HAMPSHIRE, Plaintiff, v. NEW HAMPSHIRE SECRETARY OF STATE, Defendant.	14-cv-322-PB April 20, 2015 10:15 a.m.

TRANSCRIPT OF MOTION HEARING
BEFORE THE HONORABLE PAUL J. BARBADORO

Appearances:

For the Plaintiff:
Gilles Bissonnette, Esq.
American Civil Liberties Union of New Hampshire
18 Low Avenue
Concord, NH 03301

For the Defendant:
Laura E. B. Lombardi, Esq.
NH Attorney General's Office
33 Capitol Street
Concord, NH 03301

For Intervenor, Republican National Committee:
Gordon J. MacDonald, Esq.
Nixon Peabody, LLP
900 Elm Street
Manchester, NH 03101

Court Reporter:
Sandra L. Bailey, LCR, CRR
Official Court Reporter
U.S. District Court
55 Pleasant Street
Concord, NH 03301
(603) 225-1454

BEFORE THE COURT

THE CLERK: Court is in session and has for consideration a motion hearing in civil matter 14-cv-322-PB, Libertarian Party of New Hampshire versus New Hampshire Secretary of State.

THE COURT: All right, Mr. MacDonald, what do you hope to accomplish by intervening?

MR. MacDONALD: Good morning, your Honor, thank you for your time on the motion.

We hope to accomplish protecting the rights of the Republican National Committee that clearly has something at stake in this dispute, and assisting the Court with its ultimate factual determination as to the alleged burden suffered by the plaintiff.

THE COURT: How will you assist the -- how will the Republican committee be aided by participating in the lawsuit?

MR. MacDONALD: The lawsuit implicates the New Hampshire regime governing ballot access. The Republican National Committee represents one of the parties who has achieved ballot access --

THE COURT: So you're afraid that you will lose votes to the Libertarian Party if they get the nomination?

MR. MacDONALD: Your Honor, this is about a

scheme that has a very simple amendment that has been added by the legislature to make it coherent and orderly.

THE COURT: Well, let me just interrupt you. Your goal is to have the statute declared constitutional, right?

MR. MacDONALD: Yes, your Honor.

THE COURT: That goal is the same goal that the Attorney General's office has, right?

MR. MacDONALD: No question, your Honor.

THE COURT: And you have an interest because your client participates in the electoral process in achieving efficient ballot access that gives the voter the optimum ability to choose, and you have a strong interest in that because you're a participant in the process, right?

MR. MacDONALD: Yes.

THE COURT: And that interest is identical to the Attorney General's office's interest. That interest, right, they share an interest in doing that too, don't they?

MR. MacDONALD: They share an interest in upholding the statute and providing for orderly election, no question.

THE COURT: Apparently the legislature

determined that this amendment will promote a more efficient, fair, better electoral process, right?

MR. MacDONALD: Yes, your Honor.

THE COURT: You have an interest in that. The state legislature has an interest in that.

MR. MacDONALD: Your Honor, yes.

THE COURT: And the A.G.'s Office is representing the state's interest there. And you're nodding your head yes. And that interest is identical to your interest, right, that part of it, just that. The only thing I can see that's different between you and the state is if you wanted to make the argument that, oh, judge, we're afraid we will lose votes to the Libertarian Party if they are given access, that would be particular to your party and not a general interest that the public shares. Are you going to make that argument?

MR. MacDONALD: Your Honor, that is -- there is that possibility. We're not presenting that argument.

THE COURT: Is that the basis for your request to intervene?

MR. MacDONALD: Your Honor, we -- the answer is no, your Honor. Our basis to intervene is that we are a participant in this process.

THE COURT: I understand that.

MR. MacDONALD: And --

THE COURT: The challenge, though, for you, Mr. MacDonald, as you know, is the Maine fair elections case, and in that case Judge Boudin gave us I think a very good analysis of the rule. And it seems to me that it's very hard to make the case that the Attorney General's office cannot adequately represent the interest that you're advancing here, so why don't you try and do that.

MR. MacDONALD: I'm glad you -- the Daggett case written by Judge Boudin. I would really invite the Court to read the concurring opinion by Judge Lynch. She makes the point that in the case of elections and campaign regulation, those affected, those participating in the process are distinct from the generalized citizenry, and she says that the normal considerations of judicial economy which really are behind the adequacy of representation prong, should give way because the court in this case and in that case needs to make very particularized factual findings under the First Amendment.

THE COURT: Here's the problem for you. The Maine Clean Elections case was a much stronger case for intervention than you present, because those plaintiffs

were directly benefitting from the ability to collect public financing by participating. Their ability to do that was being threatened by the constitutional challenge. Since you have disclaimed an argument that you want to try to keep the Libertarian Party from siphoning votes off of you, you're not left with anything else other than the generalized interest that is identical to the A.G.'s office interest, whereas the plaintiffs in the Maine Fair Election case has at stake a specific ability to benefit from that statute, whereas you're not claiming anything other than a generalized ability to benefit.

MR. MacDONALD: I respectfully disagree, your Honor. First of all, elections are won and lost sometimes in the margin, and who qualifies for the ballot and who does not qualify for the ballot is a particular interest of the established cadence. And the scheme that we have in our state --

THE COURT: I don't want to be unfair to you, but you're in a difficult spot because your client does not want to publicly admit that you're afraid of votes being siphoned off, and without admitting that you're really weakening your case for intervention as of right.

MR. MacDONALD: But may I, your Honor.

THE COURT: Yes.

MR. MacDONALD: The scheme that the legislature is trying to correct has a very real and practical effect on a participant, another party. There are two means to get on the ballot if you are not one of the major parties.

Means number one is to have individuals be nominated by petition. Since 2009 the requirement under that statute has been the same requirement at issue in this case. Those petitions need to be filed -- need to be signed and dated in the year of the election.

The second means is the means at issue in this case, where no such requirement existed, and the legislature is just trying to take two statutes governing the same subject matter and rationalize them. That's what this case is about.

Now, why is that important to a participant? 655:44 presents the opportunity for objection, and here you have a completely chaotic system where you have one set of petitions that are governed by one rule and another set of petitions that are governed by another rule. And this is not just hypothetical. This played out in 2012 --

THE COURT: Well, look, I don't want to argue the merits of the law yet because we will have a chance to do that, and whether I give you intervention or not,

I'm very willing to give you amicus status so that you can file a brief and present argument on it, so let's not take time now.

The real focus on this thing, you need to understand my concern. Intervention as of right, there is a rule requirement, and what you need to do is point out why that colleague over there sitting there representing the Attorney General's office can't do the job. Why is she not adequately able to represent the interests that you're seeking to have vindicated here?

MR. MacDONALD: And the Court is absolutely right, that is an issue profoundly squarely before us.

The Secretary of State regulates elections. We are a regulated party. The Secretary of State is calling balls and strikes. We're saying no, that's in the strike zone. The Attorney General is uniquely charged with enforcement of election laws. There is --

THE COURT: You're not claiming there's a conflict of interest or anything like that?

MR. MacDONALD: There's a potential for adversity. I mean --

THE COURT: Well, where's the potential conflict? I don't get it.

MR. MacDONALD: For instance, and this happened in the Rhode Island case, if the Attorney

General -- and I want to go on record, we have no argument or dispute with the way this case has been defended, there's no question about nonfeasance or anything like that, but I don't know if the Attorney General, for instance, or the secretary will choose to appeal the case.

THE COURT: Okay. I think Judge Boudin's opinion addresses that quite nicely by saying let's cross that bridge when we get to it. And I'm certainly open, if they were, somehow they, I rule this thing is unconstitutional and the A.G.'s office was so by my opinion that they decide to fold which they've never done in the past, even when I've later been vindicated by the United States Supreme Court as in the last First Amendment in the case that I had that was ultimately taken up in the Vermont case by the U.S. Supreme Court that agreed with me rather than the First Circuit. So, they didn't cave on that one. I can't imagine they're are going to cave on this one if I say it's unconstitutional. But if they do, you can file a motion to intervene at that point to make sure that there's an appellate -- and I would be, frankly, wanted to pursue it, I would be very willing to consider that personally because I always like my decisions to be subject to review because I might make a mistake.

So, I don't have any problem with that. So I think we can probably take care of that issue when we get there.

MR. MacDONALD: And, your Honor, I appreciate the Court's remarks, but I guess my view of that issue, and Judge Boudin mentions this twice in the Daggett cse and in the Mass. Food Wholesales case, he kind of leaves this prospect out there. But I would respectfully suggest, your Honor, that kind of invites the problem that we face which is, you know, if we were to take an intervention as of right and the Court were to grant it, if the secretary chose not to appeal, we would be prejudiced by not having developed the record.

THE COURT: Okay.

MR. MacDONALD: And not --

THE COURT: Let's try to focus on that. Are they shutting you out, is the A.G.'s Office unwilling to hear you as to what you think ought to be done in terms of the trial strategy here?

MR. MacDONALD: Your Honor, no, not thus far, but I can tell the Court, and I think Ms. Lombardi would agree, we haven't had discussions about that. But, may I say the Court's very specific focus set forth in your December 30th order is really important. You need to make factual determinations about the alleged burdens.

The alleged burdens are those alleged by an organization seeking to become a party. And the burdens go towards electioneering, voter contact, fundraising. That's what the Republican National Committee does. That's what the Republican Party does. That is how we are --

THE COURT: We already closed discovery in this case, haven't we? We're done basically.

MR. MacDONALD: Yes, your Honor.

THE COURT: And we need to have it done and done quickly because if I did declare the statute unconstitutional, we would need to do it in a time that would allow the party to respond. So, it's pretty late in the game. That's why I was trying to give you this hearing as quickly as you could and you guys ended up having to postpone it. But we're late in the game to be having you come up with a whole new evidentiary strategy.

MR. MacDONALD: Your Honor, as I must, I must concede that, but there are three things -- one definite thing that's going to happen in this case and two potential things. One is summary judgment.

Summary judgment is obviously a process constrained by Rule 56, the local rules of this Court, your scheduling order. It's a discrete process. It's

impossible for me to say right now were we granted intervention what our brief would be on the other side. I don't know if the plaintiff, you know, what evidence the plaintiff will present. But your Honor, it's quite possible, possible, that the Court may feel that it needs to hear evidence after summary judgment.

THE COURT: It's probably unlikely in this case. I suspect and have suspected all along that the case would be resolvable on the papers, but I can't rule it out.

MR. MacDONALD: In your Honor's order in December suggested that it's at least a possibility. The Court needs to make factual findings. And were that to happen, we would, as the rules of the Court require, disclose our witnesses, disclose whatever exhibits we're going to use, and if the plaintiff feels a need to depose any of our witnesses that haven't been deposed yet, obviously we would make accommodation.

And then third, obviously, is what we've discussed which is the appeal that may or may not happen, but I would suggest that if we have a right at the appellate stage, we should have a right now, so we are not prejudiced on the record that goes up to the First Circuit should one go up.

THE COURT: Well, I'm proposing to give you,

I'll have to hear it from the other side see if they object, but I'm proposing to allow you to participate as amicus. I would value and I have valued your input, you're obviously a very skilled lawyer and I would value your thoughts on this. I'd give you a chance to argue orally. I'm suggesting I'm open to the possibility of giving you a right to appeal should the Attorney General's office cave in the face of an adverse ruling.

So, it seems to me the only thing that's left for you to be concerned about is this idea of, well, we could put a much better evidentiary record in than the A.G.'s office could. And I understand you're saying my client is more experienced in the process of running and therefore we have to get, although I can't imagine that the Republican Party has had to get nominating petitions -- I can't imagine, when is the last time you did it?

MR. MacDONALD: Never, your Honor.

THE COURT: So you can't bring a lot of expertise to the table on how to get nominating petitions that isn't available to other people, but I understand you're a participant in the electoral process. Mostly what this case, it's going to be to some extent about what they say about how hard it is for them, but a big part of it is what the A.G.'s office

says about how the supervisors of checklists can function and how they can manage this election. On that they have far more expertise and accessibility than you, so their point on building is off the record, they're in a much better position than you are on that point.

On the point about petitions, you don't have any experience with petitions so you can't really bring any expertise to bear on that. Why shouldn't we just give you amicus status, encourage the Attorney General's office to listen to you about how to present the best possible case without giving up control. I assume an advocate like you would be very willing to hear suggestions from another skilled lawyer, and let's get the best record possible that way. What's wrong with that?

MR. MacDONALD: Your Honor, just, if I may respectfully just take issue with one thing --

THE COURT: Okay.

MR. MacDONALD: -- on petitioning. Petitioning is nothing more than contacting voters. It's what we do.

THE COURT: Well, it's a different kind of contacting voters.

MR. MacDONALD: True.

THE COURT: I mean, the petition drives are,

you know, there are requirements that have to be met for them that are different from what you folks have to deal with because you always get the threshold. There may have been, people in your party may have been in other kinds of petition drives, I mean, those things do happen, so they might have some experience, but not radically different from the kind of experience that anyone could tap into if they are trying to question -- suppose the Libertarian Party comes up with some completely bogus argument about how difficult it is to get petitions. I assume the Attorney General's office would look to other people with potential expertise and would be open to hearing from you if you have it, although your expertise would be viewed with greater skepticism because you're a competitor, whereas they might be looking for somebody who is an independent expert to challenge.

So, just give me as specifically as you can, based on what you know now, what would you present that you don't think the Attorney General's office is going to present?

MR. MacDONALD: The perspective of what it takes to contact 20,000 voters over the period of 210 days and get them to commit by signing petitions. I mean, there is basic blocking and tackling that goes on

in a campaign. This is not -- this is what we do. There are techniques. There are ways to do it. It is not hard. You quantify the goal. You break it down by days. Their goal translates into 95 petitions a day. That's it. And so you go about how do you do that. And of course our premise, your Honor, would be this is not actually a burden. It's a benefit. You go out and you petition, you're advocating with potential voters. You're getting them to commit. You're exposing those voters to candidates in the party. It's not a burden. It's a benefit. That's what the party does.

THE COURT: Well, we'll get to the merits, but their counterargument is, of course, that we have to be distracted close up to the election of getting our petitions when we want to be focusing on other goals like getting people to the polls and raising money. That's their argument as to why it isn't, I've heard them say, and I understand your point, that getting that face to face contact as early as possible is a key aspect of winning a vote. If you can get somebody on a petition, you're more likely to get them to vote. If you can do that within the year of the election, they're more likely to end up getting solid voters. I understand that argument. It's certainly a plausible argument. But I understand the counterargument as well.

All right, well, you want to wrap up on this issue, and if you have an argument on permissive intervention in addition to what you've said, I'll hear you on that, too.

MR. MacDONALD: May I on the amicus brief -- amicus because I don't think I answered the Court's question.

If the Court were to rule that way, you know, we would certainly accept that. I would just ask that if the Court does decide that it needs an evidentiary hearing, that it might revisit, at least hold out the possibility that the Court would revisit our amicus status.

THE COURT: Well, I think what I would be inclined to do is to hear you on why I ought to if you had a specific proposal about, judge, we have one witness that we wanted to have heard and the parties are not letting us produce this evidence, the witness would testify as to the following which would affect the results of the case, yeah, maybe that is an argument at that point that interests need to be different. So, I'm open to considering it although I think it's frankly somewhat unlikely. I think the force of your legal arguments that are ultimately going to be helpful to me are probably much less likely that you will be able to

produce some unique evidence. But I would encourage you, and my inclination is to rule against you on your intervention as clear from my questions, but I would urge you to continue to consult with the Attorney General's office representative. Every -- well, the plaintiffs don't, but I have an interest in having the best possible record built so that I can have the greatest likelihood of reaching the correct result. So, I would encourage that kind of dialogue.

All right, thank you.

MR. MacDONALD: Thank you, your Honor.

THE COURT: Let me just, first let me just hear briefly from the Attorney General's office.

So do you anticipate any areas where your interests are going to be diverging from the New Hampshire Republican Party interests as they have articulated here? I understand you don't have an interest in supporting the Republican Party vis-a-vis the Libertarian Party, but that's not the basis for which they're seeking intervention. As they've characterized their interests, do you see your interests in any way being divergent from the Republican Party's interests?

MS. LOMBARDI: I don't think our interests diverge. They might have some factual, more factual

knowledge in terms of campaigning and issues such as that, but I think we both -- our interests would be aligned with theirs.

THE COURT: Would you be open to hearing from Mr. MacDonald about his suggestions about how the evidentiary record might be best developed?

MS. LOMBARDI: Yes.

THE COURT: And I'm not saying -- you have to maintain your independence of judgment, you're not doing this for the Republican Party, you're doing it to defend the constitutionality of the statute, but I think it still is useful to hear suggestions from anybody who is willing to offer them, and they have an expertise, and certainly Mr. MacDonald does have the legal expertise and the party may have some knowledge about things like fundraising difficulties, gearing up for a general election campaign, things like that that might be useful.

Did you want to say anything else in response to what Mr. MacDonald said?

MS. LOMBARDI: I don't, your Honor, thank you.

THE COURT: All right, I'll briefly hear you. As I said, my inclination is to deny intervention as of right and permissive intervention but to permit amicus status including an opportunity to present oral

argument. I'm inclined to give them an opportunity to argue to me at a later point, if there is a need for an evidentiary hearing, that the record could be, they should be allowed to intervene at that point for the purpose of presenting some kind of specific evidence that has not adequately been presented, and I'm willing to consider a request to give them intervenor status for the purposes of appeal in the event that the Attorney General's Office decides not to pursue the challenge to the next level. Beyond -- with that as my likely ruling, is there anything you would like to say?

MR. BISSONNETTE: I do have some concerns with that ruling. Obviously I understand, and our position is that there shouldn't be permissive intervention. Of course our position is that there shouldn't be intervention as of right in this case, but I don't think this Court should be sympathetic to the notion that the RNC wants to present new evidence in this case. This case is nine months old. They filed their intervention request one month ago. When this case was filed, it was broadly disseminated in the press, both in NHPR and the Union Leader. If they really had the facts that were so critical to the objectives that they want to assert in this case, they could have easily brought their request to this Court in July, and they haven't done that. And

I have a lot of concerns, your Honor, about accommodating the requests of the RNC, whether it's through amicus status or whether it's through an evidentiary hearing --

THE COURT: What's your problem letting them file a brief? Are you afraid they'll have a legal analysis that will blow me away?

MR. BISSONNETTE: My concern is not so much on the legal analysis, legal analysis, frankly, which I think the state can more than adequately address, my concern is the RNC desire to add new facts in this case, new facts that have not been tested. We have not -- we will have had no ability, frankly, to I think adequately respond to the fact that the RNC --

THE COURT: An amicus brief doesn't give you a chance to bring in evidentiary facts. I recognize that there is sometimes amici try to bring in facts that are of the kind that a court would take judicial notice of, or kind of a broad we used to call a Brandeis Brief argument, but I'm not going to let them use the amicus status to come in and produce evidence that becomes part of the record and isn't subject to cross-examination to contention.

MR. BISSONNETTE: Thank you, your Honor, and that was my chief concern with respect to amicus status.

THE COURT: No, it's not a backdoor of bringing in untested evidence. Evidence is evidence. It has to be subject to testing. But, you know, we will see what they end up producing, but I'm not going to let them put in evidence, unless I granted them intervention status to put on specific evidence, which I say I think it's unlikely, but I'm at least open to hearing from I should do that. We have to consider a variety of factors if I were to do that. I'd have to give you an opportunity to test that --

MR. BISSONNETTE: Thank you.

THE COURT: Do depositions. It would potentially delay the case, then we have a problem with the deadlines and the ability of the parties to gear up for this election cycle. So there are issues about doing that that would have to be overcome, and I would want to meet with the parties and try to work out a practical solution.

MR. BISSONNETTE: Thank you, your Honor, you've addressed my chief concern. You know, our strong desire that any amicus brief submitted by the RNC is again limited to legal arguments and they shouldn't be permitted to insert factual issues that haven't been tested through the adversarial process.

Again, your Honor, I think this is untimely,

it should be denied. We also I think have adequately briefed in our case the fact that the state has more than adequate to address this issue. They've been diligently defending the statute per their obligation. They have sent us document requests, interrogatory requests. We've complied with our discovery obligations, in fact produced 14 hundred pages of documents evidencing the burden in this case, and in fact showing that petitioning is fundamentally different than campaigning. So, to the extent that the RNC is raising that, we have a fully developed record, the state has had the opportunity to cross-examine our witnesses on that very point. And in fact, with respect to the argument raised by the RNC that this law is simply designed, the challenged law, to render symmetrical the deadline for individual petitioning with now the deadline for party petitioning, all of the rationales for the law of course can easily be presented by the state, we've deposed the state's witness probing the interest of the law; in fact, that wasn't the interest proffered by the state. The interest proffered by the state was verification rate issues, the same interest that was struck down in fact in the Block case out of Rhode Island. But I'm only mentioning this to rebut a few points, your Honor, to suggest to the Court

that the state is amply defending this lawsuit and they've done a very diligent job.

Your Honor, just to echo a point that you made before. The RNC I think doesn't have an interest here that's any different than an interest of an average citizen. Of course a political party has an interest in fair orderly election procedure. So does a voter. So does a citizen. So I don't really frankly see anything with respect to the interest they are asserting here. The interest, if you read their brief, is simply a fair and orderly election process. That interest is shared by everyone.

THE COURT: I think they are in a difficult spot. I suspect that people within the party are concerned about this because they fear a loss of votes, but they aren't willing to advocate that.

MR. BISSONNETTE: Which of course wouldn't be a legally recognizable interest for the intervention analysis, your Honor. So, I won't belabor the point. I think all of the issues, all of my points are in our brief. We would ask respectfully that the intervention motion be denied, and that to the extent there is amicus status granted, that it be limited to legal argument only. Thank you, your Honor.

THE COURT: All right. Fortunately we have

the benefit of the First Circuit's decision in Daggett versus Commission on Ethics and Elections, which is reported at 172 F.3d 104. Judge Boudin as he always did authored a brilliant analysis of the rule and provided clear guidance to courts who have to apply the rule. I find the Court's reasoning persuasive, and even if I didn't, I would follow it, but I will follow it as closely as I can.

Of course there's a four-part test for intervention as of right. I'm not going to comment on or make specific findings with respect to three of the four factors. I will be saying a few things about timeliness and about the applicant's interest, but I'm going to focus my ruling and base my ruling on my judgment that the applicant's interest here is adequately represented by existing parties.

This is a case in which the Attorney General's Office is quite well positioned to defend the constitutionality of the statute and is able to protect the interests that the Republican Party has advocated here. They are aggressively defending the constitutionality of the statute. They're developing the record. They've participated in discovery. The Attorney General's Office is quite skilled in matters of constitutional law. They have a number of skilled

attorneys that can advocate for the state. They have access to the legislative history of the case and the ability to interact with supervisors of the checklists, and therefore they will be able to develop a good evidentiary record here.

I'm not persuaded by anything Mr. MacDonald has said today that his client's interests is in any way adverse to the interests that the Attorney General is seeking to advocate. I don't see any potential for a conflict here, and I am completely satisfied that the Attorney General's Office is able to adequately develop the record here and advance and protect the very same interests that the Republican Party is seeking to advance and protect. And that's the primary reason why I am not granting intervention as of right.

With respect to permissive intervention, I do have some concerns with timeliness, and my concern is the discovery process is closed here. I need to move this case quickly because I've agreed to advance the preliminary injunction motion with the hearing on the merits. I think we're in a position to have a well developed evidentiary record available for summary judgment motions and that we can conduct an efficient and expeditious trial on the merits if we need to do that, and I am concerned if I were to grant intervention

status, permissive intervention, that it would potentially delay the case and introduce confusion into it.

I'm not as convinced as Mr. MacDonald is that the Republican Party has some unique expertise here that would be of benefit to the Court. I am of course, as I said, interested in Mr. MacDonald's legal analysis. I'm open to the possibility that he might have some specific expertise that he can present to me at a later time, but based on what I've heard so far, I'm not at all convinced that the Republican Party has any special expertise or special ability to develop a better evidentiary record here. This case is about petitions, and the Republican Party, because it's always been a strong party, it never had to get on the ballot, at least in recent memory, by way of nominating petitions, and I think its expertise in that area is far less. I recognize it is a political party. It does have expertise in the business of electioneering and motivating voters and raising money, and his views on those matters could potentially be of some bearing in the case, but on balance I think my concern, the timeliness and potential for confusion of the case outweighs any minimal interest that I can see at the present time by allowing permissive intervention status.

This is especially true because I do believe I can benefit from hearing the Republican Party's view by way of an amicus party, and therefore I will grant the Republican Party amicus status. It should be notified of any filings and hearings. It will be given an opportunity to file a brief in accordance with the -- do we have a briefing schedule for summary judgment worked out?

MR. BISSONNETTE: Yes, your Honor, we do. In fact, the summary judgment brief is due two weeks today. We're working on it as we speak.

THE COURT: All right, Mr. MacDonald, I think the appropriate time for you to file your amicus brief is at the same time that the state files its brief, so you just marry on to that schedule and file your amicus brief whenever the AG files its brief.

MR. MacDONALD: I believe, for the record, your Honor, that's June 1st is the deadline for the state.

MR. BISSONNETTE: It may be. I don't recall exactly.

THE COURT: Whatever it is you'll look it up and you'll file by that date, I'll hold oral argument, and I'll give you an opportunity to be heard. As you know, my oral arguments are somewhat loosely structured.

They can go for a long time. I'm sure you will have a full and fair opportunity to say anything that you want to say. And given the fact that I'm giving you this amicus status, I don't believe there's any need to have you be granted permissive intervenor status, especially because I am willing to reconsider the subsequent points in the litigation whether your status should change, in particular, although I'm skeptical about whether I will allow you to intervene in and have an evidentiary hearing to produce evidence, I will at least hear on what it is you would want to produce and how you would want to do it before I make a ruling, and finally I will consider, if the Attorney General's Office decides not to appeal some adverse ruling, I'll hear you on your request at that time to be granted intervenor status for the purpose of making sure an adequate appellate record is developed. My thinking on that is without prejudice. I haven't made any judgment one way or the other about it.

So, the motion to intervene either as of right or permissibly is denied without prejudice. The Republican Party will be granted amicus status, permitted to file amicus brief and present oral argument, and I will consider any subsequent requests if it makes one.

Is there anything else we need to deal with today?

MS. LOMBARDI: No, your Honor.

MR. BISSONNETTE: No, your Honor.

MR. MacDONALD: Thank you, your Honor.

THE COURT: All right, thank you.

(Hearing concluded at 10:50 a.m.)

C E R T I F I C A T E

I, Sandra L. Bailey, do hereby certify that the foregoing transcript is a true and accurate transcription of the within proceedings, to the best of my knowledge, skill, ability and belief.

Submitted: 11/16/2015

SANDRA L. BAILEY, LCR, CM, CRR
LICENSED COURT REPORTER, NO. 15
STATE OF NEW HAMPSHIRE

EXHIBIT D

THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH
SUPERIOR COURT

Hillsborough Superior Court Southern District
30 Spring Street
Nashua NH 03060

Telephone: 1-855-212-1234
TTY/TDD Relay: (800) 735-2964
http://www.courts.state.nh.us

NOTICE OF DECISION

FILE COPY

Case Name: **League of Women Voters of New Hampshire, et al v William M Gardner, et al**
Case Number: **226-2017-CV-00433** ***226-2017-CV-00432***

Please be advised that on June 08, 2018 Judge Temple made the following order relative to:

ORDER OF THE COURT

May 14, 2018 "The defendants will file an objection to the plaintiffs' motion to strike (court index #84) by May 17, 2018. The plaintiffs will file a reply to this objection by May 18, 2018."

ORDER ON DISQUALIFICATION

June 8, 2018 "See copy of enclosed order."

June 08, 2018

Marshall A. Buttrick
Clerk of Court

(564)

C: Henry R. Klementowicz, ESQ; Steven J. Dutton, ESQ; Paul Joseph Twomey, ESQ; Bruce V Spiva, ESQ; John M Devaney, ESQ; Marc E Elias, ESQ; Anne M. Edwards, ESQ; Amanda R Callais, ESQ; Anthony J. Galdieri, ESQ; William E. Christie, ESQ; Suzanne Amy Spencer, ESQ; Bryan K. Gould, ESQ; Cooley Ann Arroyo, ESQ; Callan Elizabeth Maynard, ESQ; Uzoma Nkwonta, ESQ; Elisabeth Frost, ESQ

THE STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS. **SUPERIOR COURT**
SOUTHERN DISTRICT

Docket No. 2017-CV-432

New Hampshire Democratic Party

v.

William M. Gardner, New Hampshire Secretary of State
Gordon MacDonald, New Hampshire Attorney General

Docket No. 2017-CV-433

League of Women Voters of New Hampshire;
Douglas Marino; Garrett Muscatel; and Adriana Lopera

v.

William M. Gardner, New Hampshire Secretary of State
Gordon MacDonald, New Hampshire Attorney General

ORDER ON DISQUALIFICATION

Procedural History

On April 26, 2008 Attorney Brian K. Gould filed his appearance for the defendants in this case. Subsequently, at a status hearing held on May 7, 2018, the Court made the following disclosure:

> "THE COURT: Good morning.
>
> All right. I had this status hearing immediately on Friday getting prepared and reviewing the file as I try to do almost on a weekly basis at this point. I noticed the appearance had come in from Cleveland, Waters and Bass and Attorney Gould specifically. I have to make a disclosure based on that appearance.
>
> I have what I would view as a very close, personal relationship with Attorney Gould. We basically raised our families together. His daughter is like a daughter to me. I just officiated her wedding last summer. It's a long-term relationship. I would say it began, oh, well over 20 years ago. My youngest daughter was cared for by Elizabeth Gould, who is a very

close friend of myself and my wife's. Certainly, Elizabeth had a profound impact on her life. My daughter, Riley, was on a series of softball teams that could never win the big game, and I primarily blame that on Coach Gould, not Coach Temple, over the course of I would say 15 years or so.

The bottom line, as it relates to that relationship in this case, is I don't think I can continue as the Judge in this case under Canon 2, Rule 2.11. I think it's a conflict that leaves me in a situation where I can't even have you waive the conflict. I'll get your input on that because I do respect all counsel in this case.

But this is just not a friendship on a professional level with one of you involved in this particular case. This is a personal relationship that goes well beyond that. It's a personal relationship which would affect a reasonable observer's perception of fairness in this case under Rule 2.11. I've reviewed several cases in New Hampshire, a Superior Court case and a Supreme Court case. The examples these cases use when there's a conflict that could be waivable run directly against my involvement with Attorney Gould.

So there's the McGuire case where they're using examples of what Judge McGuire did not do with this particular attorney, and each one of those examples is something that I have done over the course of the last 22 years with Attorney Gould.

I have spoken to Chief Justice Nadeau about this particular disqualification this morning because she is sitting here this week and she'll make a decision in terms of the transfer of this case. I expect, based on my initial discussions with her, that based on my conflict, the case will be transferred over to Judge Colburn and will remain in Hillsborough County. But in fairness to all of you, I want to give you the opportunity to address what I view as a disqualifying conflict under Rule 2.11..." (May 7, 2018 Status Conference Transcript at p. 4-6.)

At the conclusion of the status conference, the Court set a briefing deadline of May 11, 2018. On May 11, 2018, the State filed its Memorandum Regarding Recusal (See Court Index #81). Senator Regina Birdsell filed a Statement Concerning Recusal (See Court Index #82). Additionally, Representatives Kathleen Hoelzel and Barbara Griffin filed a Statement Concerning Recusal (See Court Index #83). Finally, the League of Women Voters of New Hampshire filed a Motion to Strike Appearance and Disqualify Bryan K. Gould / Statement Concerning Recusal (See Court Index #84).

The Court held a hearing regarding the disqualification issues on May 14, 2018. After this hearing, the defendants filed their Objection to Plaintiffs' Motion to Strike Appearance and Disqualify Bryan K. Gould on May 17, 2018. The plaintiffs filed their Reply in Support of Motion to Strike Appearance and Disqualify Bryan K. Gould on May 18, 2018.

It was the Court's intention after the May 14, 2018 hearing to issue a decision by the following Monday or Tuesday. However, the Court's order on this disqualification issue was delayed by its trial schedule and the extensive nature of the parties' filings. The Court has carefully considered the pleadings, the arguments of counsel, the hearing transcripts, and the applicable law as part of its decision-making process. After this exhaustive review, the Court disqualifies himself under Canon 2.11 (A)(1) of the Code of Judicial Conduct.

Legal Analysis

Disqualification of a judge from pending litigation is governed by the New Hampshire Code of Judicial Conduct as codified in Supreme Court Rule 38. Canon 2, Rule 2.11 directly applies to the present circumstances in this case. Rule 2.11 on disqualification specifically provides as follows:

> "(A) A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to the follow circumstances:
>
> (1) The judge has a personal bias or prejudice concerning a party or a party's lawyer..."
>
> Importantly, Rule 2.11 must be balanced with Rule 2.7 which provides as follows:
>
> "A judge shall hear and decide matters assigned to the judge, except when disqualification is required by Rule 2.11 or other law."

There is no doubt under existing law that "the Code of Judicial Conduct requires a judge to disqualify himself whenever 'the judge has a personal bias or prejudice concerning a party or a party's lawyer.' (Quoting Sup. Ct. R. 38, Canon 3 E (1)(a)-amended 2011, current version at Canon 2.11 (A)(1)). This rule requires the judge to examine whether or not he has a personal bias, which is a subjective standard, rather than an appearance of bias, which is an objective standard." In the Matter of Tapply and Zukatis, 162 N.H. 285, 302 (2011).

Additionally, the Code of Conduct "requires a judge to disqualify himself in a proceeding where the judge's impartiality might reasonably be questioned and to avoid even the appearance of impropriety." Id (citations omitted). "The existence of an appearance of impropriety is determined by an objective standard, i.e., would a reasonable person, not the judge himself, question the impartiality of the Court." See State v. Belyea, 160 N.H. 298, 303 (2010). "The objective standard is required in the interest of ensuring justice in the individual case and maintaining public confidence in the integrity of the judicial process which depends on a belief in the impersonality of judicial decision-making." Id. "The test for an appearance of impartiality is whether an objective, disinterested observer, fully informed of the facts, would entertain significant doubt that justice would be done in the case." Id. (quotation omitted). See also, Taylor-Boren v. Isaac, 143 N.H. 261, 268 (1998).

This case involves a close, personal relationship between the Court and Attorney Gould. "It is inevitable that judges will have had contact with attorneys before appointment to the bench, and will continue to have some contact after they are

appointed. Judges are members of society and are not expected to live isolated and sheltered lives. Id. at 269. Whether or not disqualification is required in this case based on the Court's friendship with Attorney Gould hinges on how personal the relationship is between the Court and Attorney Gould. Id. at 268-269.

The Court has stated on the record that he has a "very close, personal relationship with Attorney Gould." (May 7, 2018 Status Conference Transcript at p. 5.) The Court's disclosure about this relationship speaks for itself. This personal relationship can be summarized as follows:

1. Judge Temple's wife, Kelly Temple, is a close friend of Attorney Gould's wife, Elizabeth Gould.
2. The Temple and Gould families have shared many community and family events together over the years.
3. Attorney Gould and Judge Temple coached minor league, little league and Babe Ruth softball together and against each other for nearly 15 years.
4. The Temple children and the Gould children continue to maintain their friendships. Attorney Gould's daughter, Lizzy Gould, accompanied the Temple family on multiple family vacations. She remains close friends with Judge Temple's daughters.
5. Judge Temple provided legal representation to members of the Gould family. He developed a professional and personal friendship with Attorney Gould's father.

6. Judge Temple was the officiant for Lizzy Gould's wedding in the fall of 2017. While he did not take a fee as an officiant, Judge Temple accepted a complimentary hotel room for one evening from Attorney Gould.

This summary is a more complete description of the Court's relationship with Attorney Gould. Under the Code of Judicial Conduct, the Court is required to disqualify himself based on a favorable personal bias towards Attorney Gould rooted in this long term personal relationship. Pursuant to Rule 2.11 (A)(1) the Court must examine whether or not he has a personal bias under a subjective standard rather than an objective standard. The Court was very clear to the parties at the hearing of May 7, 2018 that he viewed the relationship with Attorney Gould as a very close personal relationship. After pondering and thinking about the nature and extent of this particular relationship, the Court is convinced on a subjective basis that he has a personal bias concerning Attorney Gould that requires disqualification under Rule 2.11 (A)(1).

Alternatively, the Court notes that under the applicable objective standard a disqualification is warranted in this case. The relationship and contact between the Court and Attorney Gould over the course of over two decades affects a reasonable observer's perception of fairness. Taylor-Boren, 143 N.H. at 269. The Court's impartiality under these circumstances is subject to reasonable questioning and a disqualification avoids even the appearance of impropriety. Tapply, 162 N.H. at 302. Under the objective standard, this Court must ensure justice and maintain public confidence in the integrity of the judicial process. Id. An objective, disinterested observer, fully informed of the relationship between the Court and Attorney Gould, would entertain significant doubt that justice would be done in this case. Id.

The Court's priority in this case is to protect the litigants' right to a fair and impartial determination. He is obligated to preserve public confidence in the impartiality, independence and integrity of the Court, especially in a case like this which is of great public importance. While the Court has a strong desire to see this case to a conclusion, compliance with Rule 2.11 is mandatory. This Judge must place the need for impartial justice over his own preferences.

As part of its ultimate decision on the disqualification issue, the Court considers its obligation to hear and decide this matter under Canon 2, Rule 2.7. The parties have briefed this particular issue in an exhaustive manner. The Court is not inclined to engage in a lengthy review of the Federal and State authorities relied upon by the parties. Suffice it to say, the Court has considered these extensive authorities in a meaningful manner.

"A defendant's right to counsel of his choice...is not absolute; it is 'circumscribed in several important respects.'" State v. Gonzalez, 170 N.H. 398, 404 (2017). (Citations Omitted). "A defendant's right to chosen counsel is limited by the trial court's 'independent interest in ensuring that [ ] trials are conducted within the ethical standards of the profession and that legal proceedings appear fair to all who observe them.'" Id. (citations omitted). "A trial court's interest in the ethical, fair, and orderly administration of justice may outweigh a defendant's right to chosen counsel when, for example, the trial court determines that a defendant has asserted his right to dismiss counsel as a dilatory tactic." Id. "Similarly, '[w]hen circumstances exist involving the selection of counsel with the sole or primary purpose of causing the recusal of the

judge…the right to counsel of choice can be overridden.'" Id. at 405; In re BellSouth Corp., 334 F.3d 941, 956 (11th Cir. 2003).

The presumptive entitlement to counsel of a party's choice "may be overridden only if 'compelling reasons' exist." In re BellSouth Corp., 334 F.3d at 961. The burden of proving the grounds for disqualification rests upon the party moving for disqualification of counsel. Id. The plaintiffs' task in seeking a removal of Attorney Gould in this case is a heavy burden. Id.; Evans v. Artek Sys. Corp., 715 F.2d 788, 794 (2nd Cir. 1983).

In their pleadings, as well as at the hearing of May 14, 2018, the plaintiffs concede that Attorney Gould's appearance is not a dilatory tactic or filed to cause the recusal of the Court. Attorney Spiva summed up the plaintiffs' view of Attorney Gould at the hearing of May 14, 2018, by stating as follows:

> "No one is questioning Mr. Gould's motives, and no one is questioning that he is a high caliber lawyer, and you know, is held in high regard I think by both sides. I haven't had the pleasure of knowing him but having talked to my co-counsel, you know, people…you know, he's well-liked and well-regarded. So this is not about that, Your Honor…" (May 14, 2018 Hearing Transcript at p. 5).

The Court also finds that the defendants hired Attorney Gould because of his expertise and experience on voting laws, SB3, and complex litigation. He and his associates are well qualified to handle this litigation. The State has made an informed choice to retain him as counsel to address the pre-trial and trial issues presented by this case. The retention of Attorney Gould is appropriate and necessary under these circumstances. As stated above, this retention is not a dilatory tactic and its purpose is not to cause the recusal of the Court.

Again, this Court is cognizant of its responsibility to hear and decide cases under Rule 2.7 of Canon 2. While the parties have a presumptive right to select their own counsel, it is not an absolute right. In re BellSouth Corp., 334 F.3d at 961; also see Gonzalez, 170 N.H. at 404. This Court deeply appreciates the right of each party to be represented by counsel of their own choice. This Court will only strike counsel in circumstances that interfere with the orderly administration of justice. At this stage of the proceedings, the Court has completed case structuring, issued two orders on standing, and addressed significant discovery issues on an on-going basis. The case is presently scheduled for a bench trial beginning on August 20, 2018. At this point in time, the primary focus of the Court is completion of discovery in a timely and efficient manner.

Importantly, the New Hampshire Supreme Court has recently accepted the Defendants' Petition for Original Jurisdiction on May 23, 2018, because it raises a privilege issue. (Case No. 2018-02008). Specifically, the Court has accepted original jurisdiction over the following question:

> "**Question Presented**: Did the trial court err in ruling in its April 13, 2018 Order that the Defendants had to produce the Statewide Voter Registration Database and the sensitive, personally identifiable information in it about all New Hampshire registered voters to the plaintiffs in response to civil discovery requests, where RSA 654:45 does not authorize such disclosure and thus criminalizes such disclosure?"

Along with the pending New Hampshire Supreme Court proceeding, this Court is currently faced with discovery issues regarding the Protective Order, Motions to Quash Subpoenas, a Motion to Stay, a Motion to Compel Discovery, a Motion for a Protective

Order to Prohibit Depositions of Opposing Counsel, and Motions in Limine to Exclude Expert Testimony.

At this juncture of the proceedings, especially in view of the acceptance of the Petition for Original Jurisdiction, a disqualification will not interfere with the orderly administration of justice. The orderly administration of justice in this case can be ensured through the Supreme Court's jurisdiction and another Superior Court Judge's supervision of the pre-trial process. Another Superior Court Judge can properly supervise the case in a manner that leads to the efficient administration of justice. The pending motions regarding discovery, a stay and experts are capable of resolution by another judge in a timely fashion. Rather than setting a troubling precedence, this ruling emphasizes the need to preserve public confidence in the impartiality of the Court. The constitutional magnitude of the ultimate decision in this case requires that the Court's integrity and independence be protected at all costs.

The Court agrees with the plaintiffs that the right to select counsel in a civil case is not a constitutional right. See Town of Bartlett v. Furlong, 168 N.H. 171, 177 (2015). However, there is a "general policy favoring a party's right to representation by counsel of choice" in New Hampshire. See Goodrich v. Goodrich, 158 N.H. 130, 136 (2008). In this case, the Court is exercising its discretion to deny the Motion to Strike Attorney Gould based on the present procedural status of this case, the lack of any impropriety as it relates to the retention of Attorney Gould, and the ability of another Superior Court Justice to properly supervise, control, and monitor the pre-trial process to ensure the orderly administration of justice. In view of the Court's prior rulings on standing and discovery issues, the Court does not see any significant obstacles for a newly assigned

judge to come up to speed on the pending motions and familiarize himself or herself with the case in an efficient manner. The only significant potential for delay is the pending Petition for Original Jurisdiction in the New Hampshire Supreme Court.[1] The ongoing pre-trial process in the Superior Court is one that can be managed in a meaningful, informed and efficient manner by another Superior Court Judge.

The Court truly appreciates the significance and constitutional magnitude of this case. The disqualification has not been lightly entertained in this matter. Ultimately, a recusal is mandated and necessary to preserve the integrity of the judicial system. While there are certainly valid concerns raised by the plaintiffs because of the timing of Attorney Gould's appearance and the requisite disqualification, the Court is not convinced that these concerns constitute compelling reasons to override the defendants' choice of counsel. In the Court's view, the plaintiffs have not met the heavy burden of proving compelling grounds for the disqualification of Attorney Gould. In re BellSouth Corp., 334 F.3d at 961.

Conclusion

After a review of the Federal and State authorities cited by both parties, this Court rests its determination in this case on Gonzalez and In re BellSouth Corp.. These two cases were relied upon by both parties in their respective arguments. This Court simply cannot find that there are compelling reasons to disqualify Attorney Gould where his appearance is clearly not a dilatory tactic or one used for the primary purpose of causing a disqualification. Gonzalez, 170 N.H. at 405; In re BellSouth, 334 F.3d at 961.

[1] The newly assigned Superior Court Judge will have to address the Motion to Stay on an immediate basis.

The Court will not entertain the harsh remedy of disqualifying counsel where the case in its present procedural status is capable of transfer to another Superior Court Judge with the corresponding ability to ensure the orderly administration of justice. A disqualification under Canon 2, Rule 2.11 (A)(1) is ordered in this case.

So ordered.

June 8, 2018
Date

Charles S. Temple
Presiding Justice

CST/trn