

**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 Intervenor 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 Intervenor 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 Intervenor 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