UNITED STATES DISTRICT COURT
for the
DISTRICT OF NEW HAMPSHIRE

CAROLINE CASEY and MAGGIE FLAHERTY **Plaintiffs,** **v.** **WILLIAM GARDNER, in his official capacity as New Hampshire Secretary of State, and** **GORDON MACDONALD, in his official capacity as New Hampshire Attorney General** **Defendants.**	**Case No.: 1:19-cv-00149-JL**

OBJECTION TO EDWARD NAILE'S MOTION TO INTEVENE WITH INCORPORATED MEMORANDUM OF LAW

INTRODUCTION

Plaintiffs Caroline Casey and Maggie Flaherty object to Edward Naile's ("Naile") *Motion to Intervene* (DN 11.0). Naile's motion consists largely of the following: denials of facts alleged in Plaintiffs' Complaint; disagreements that there should be a legal distinction between domiciliaries under RSA 654:1, who are permitted and constitutionally-eligible to vote, and residents under RSA 21:6, who have other legal rights and responsibilities; and attacks on students at Dartmouth who dare to run for and win elected office. Naile's motion is illuminating in one respect. It highlights the motives of the proponents of 2018 House Bill 1264 ("HB 1264"), which are and were to make it difficult and expensive for college students to vote in New Hampshire. HB 1264 will add this severe burden on thousands of constitutionally-eligible voters. On Election Day

in 2016, 6,540 voters domiciled in New Hampshire and constitutionally-eligible to vote here registered to vote using out-of-state identification. This does not include the likely thousands of others who were already registered to vote on Election Day and presented out-of-state identification to obtain a ballot. Of these 6,540 voters, 5,526 voters had not been issued a New Hampshire driver's license by August 30, 2017. This, had HB 1264 been in effect during Election Day 2016, would have needlessly criminalized up to 5,526 voters legally permitted to vote in New Hampshire. Naile's motion also places those motives in the historical context of attacks on college students' right to vote for the past forty years.

The only injury Naile asserts entitling him to intervention is that his vote will allegedly be diluted if Plaintiffs are permitted to vote in New Hampshire. But this argument misses the mark in that Plaintiffs, who are domiciled in New Hampshire under RSA 654:1, are already entitled, both by statute and constitution, to vote in New Hampshire. This lawsuit challenges not their eligibility to vote, but rather the fines they must pay as a consequence of exercising that right under HB 1264. Indeed, HB 1264 makes no change to the criteria to vote. Rather, HB 1264 imposes financial "residency" obligations on certain constitutionally-eligible voters who, like Plaintiffs, are domiciled in New Hampshire and assert their right to vote. Moreover, Naile's alleged injury of vote dilution applies equally to every registered voter in New Hampshire and so is not sufficiently particularized to permit his intervention. Finally, any interest Naile may have is adequately protected by what Plaintiffs assume will be a competent defense of HB 1264 by the Attorney General's Office.

Plaintiffs do not object to Naile filing *amicus curiae*-style pleadings on dispositive motions, but do object to his participating as a party, taking discovery, filing pleadings on non-dispositive matters, and presenting evidence at any hearings in this matter. *See Students for Fair Admissions,*

Inc. v. President & Fellows of Harvard Coll., 308 F.R.D. 39, 52-53 (D. Mass. 2015) (permitting group of students to file *amicus* briefs before the district court), *aff'd* 807 F.3d 472 (1st Cir. 2015). Naile's motion should be denied because his motion does not meet the requirements of Federal Rule of Civil Procedure 24.

I. Naile is Not Entitled to Intervention as a Matter of Right

Intervention as a matter of right is governed by Federal Rule of Civil Procedure 24(a), which states "On timely motion, the court must permit anyone to intervene who: (1) is given an unconditional right to intervene by a federal statute; or (2) claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest."

Naile identifies no statute which would give him an unconditional right to intervene, so Plaintiffs presume his claim for intervention as of right is based on Fed. R. Civ. P. 24(a)(2). A putative intervenor's failure to satisfy any of the four requirements—timeliness, sufficiency of interest, likelihood of impairment, and adequacy of other representation—defeats intervention by right. *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 807 F.3d 472, 474 (1st Cir. 2015).

Plaintiffs concede that Naile's motion is timely, but dispute that Naile meets all the other requirements for intervention as of right. "The application of this framework to the diverse factual circumstances of individual cases requires a holistic, rather than reductionist, approach. The inherent imprecision of Rule 24(a)(2)'s individual elements dictates that they be read not discretely, but together, and always in keeping with a commonsense view of the overall litigation." *Public Serv. Co. v. Patch*, 136 F.3d 197, 204 (1st Cir. 1998).

A. Naile Does Not Have a Sufficient Interest to Intervene As Of Right

"The first question is whether [intervenor] has a 'significantly protectable' interest in this suit, such that [his] claims 'bear a sufficiently close relationship to the dispute between the original litigants and the interest is direct, not contingent.'" *Maine Republican Party v. Dunlap*, 2018 U.S. Dist. LEXIS 82461, *2 (D. Me. May 16, 2018) quoting *Conservation Law Found. of New England, Inc. v. Mosbacher*, 966 F.2d 39, 41-42 (1st Cir. 1992) (brackets omitted). "An interest that is too contingent or speculative—let alone an interest that is wholly nonexistent—cannot furnish a basis for intervention as of right." *Ungar v. Arafat*, 634 F.3d 46, 51-52 (1st Cir. 2011) (citing *Travelers Indem. Co. v. Dingwell*, 884 F.2d 629, 638 (1st Cir. 1989); *Moosehead Sanitary Dist. v. S.G. Phillips Corp.*, 610 F.2d 49, 53 (1st Cir. 1979)).

Naile's supposed interest in the litigation, which comes from fears of vote dilution, is not enough to establish a right to intervention. In Naile's estimation, Plaintiffs are not sufficiently tied to New Hampshire to be allowed to vote, and this diminishes the effect of his vote because "out-of-state illegal student votes skewed NH General Elections," presumably causing his preferred candidates to lose. *Motion*, p. 12. Of course, the legislature has already decided that students are sufficiently connected to New Hampshire to vote, and has authorized them to do so, as is constitutionally required. *See* RSA 654:1, I-a.

Naile's argument is wrong because HB 1264 does nothing to change the *eligibility* of voters. Instead, HB 1264, by changing the definition of "residency" under RSA 21:6 and effectively linking this standing to the "domicile" standard that is used to determine voter eligibility under RSA 654:1, compels certain constitutionally-eligible voters who may not have plans to remain in New Hampshire indefinitely to, within 60 days of registering to vote, pay moneys to the State through car registration and driver's license "residency" fees if they own a car

and/or drive. *See* RSA 259:88 (stating that the term "resident" for motor vehicle purposes is defined under RSA 21:6); RSA 261:45, I (a person has 60 days to register a car in New Hampshire after becoming a legal resident); RSA 263:35 (a person has 60 days to obtain a New Hampshire driver's license after becoming a legal resident). If they do not comply and pay these fees within 60 days of declaring their "residency" by registering to vote, they "shall be guilty of a misdemeanor." *See* RSA 263:48 ("Any person who violates any of the provisions of this subdivision [regarding drivers' licenses] shall be guilty of a misdemeanor if a natural person ….").

Domiciliaries of New Hampshire, like Plaintiffs, are entitled to vote in New Hampshire regardless of whether they are required to pay motor vehicle fees after HB 1264 or not.[1] RSA 654:1, I-a, which legally permits college students to vote in New Hampshire if they are domiciled here, was not changed by HB 1264. Naile's claim that "Should this Complaint be successful the votes of qualified NH voters would watered [sic] down and diminished by out-of-state votes" is not true because the class of eligible voters will not change if this Court declares HB 1264 unconstitutional. Rather, it is the class of those required to domesticate driver's licenses and car registrations that will change. As a result, Naile will not be impacted by alleged "unlawful out-of-state students" diluting his vote with theirs if this lawsuit is successful and HB 1264 enjoined.

The next problem with Naile's argument is that any interest he may have in preventing vote dilution is too general to support intervention. There is nothing unique or particularized to Naile about the interest he claims; it is shared by over 960,000 other registered voters in New Hampshire. Under this logic, anytime a lawsuit challenges a restrictive voting law, every single registered voter

[1] Plaintiffs contend that the motor vehicle fees are severe burdens on the right to vote, and that the fees may so burden qualified domiciliaries (particularly young people and college students) that some will not vote. HB 1264's effects are subtle; it makes voting more expensive for some voters, but it does not change who is legally permitted to vote.

would have a right to intervene in that lawsuit. Courts have recognized that such a generalized interest is not sufficient to create intervention as a matter of right. *See Public Serv. Co. v. Patch*, 136 F.3d 197, 205 (1st Cir. 1998) ("It is settled beyond peradventure, however, that an undifferentiated, generalized interest in the outcome of an ongoing action is too porous a foundation on which to premise intervention as of right"); *S. Cal. Edison Co. v. Lynch*, 307 F.3d 794, 803 (9th Cir. 2002) (same).[2]

B. The Defendants Will Sufficiently Defend the Law

Naile is not entitled to intervention as a matter of right because the Defendants will ably defend his perceived interests. Defendants, who are represented by three attorneys from the New Hampshire Department of Justice, will likely seek the same result as Naile: a ruling that HB 1264 is constitutional. Moreover, the Defendant Secretary of State, who is New Hampshire's chief election official and will presumably defend HB 1264 in this case, was one of HB 1264's chief proponents when it was being considered by the legislature.

There are "two converging presumptions triggered [when] the Attorney General is prepared to defend the statute in its entirety. One is that adequate representation is presumed where the goals of the applicants are the same as those as the plaintiff or defendant; the other is that the government in defending the validity of the statute is presumed to be representing adequately the interests of all citizens who support the statute." *Daggertt v. Comm'n on Gov't Ethics & Elec.*

[2] While the requirements for intervention under Rule 24 and Article III standing are different, *Gill v. Whitford*, 138 S.Ct. 1916 (2018) is instructive. There, the Supreme Court found that voters had standing to challenge a partisan gerrymandering in their own districts, as a gerrymander directly disadvantages the voter as an individual. *Id.* at 1930. But the Court found that an individual does not have standing to challenge a gerrymander in district besides the one in which she lives because "a citizen's interest in the overall composition of the legislature is embodied in his right to vote for his representative. And the citizen's abstract interest in policies adopted by the legislature on the facts here is a nonjusticiable 'general interest common to all members of the public.'" *Id.* at 1931. While *Gill* addresses Article III standing, the same logic applies here: Naile's generalized interest in a non-"skewed" election is too general to support intervention.

Practices, 172 F.3d 104, 111 (1st Cir. 1999); *Maine v. Dir., U.S. Fish & Wildlife Serv.*, 262 F.3d 13, 19 (1st Cir. 2001) ("Generally, our decisions have proceeded on the assumption, that the government will adequately defend its actions, at least where its interests appear to be aligned with those of the proposed intervener"); *Maine Republican Party,* 2018 U.S. Dist. LEXIS 82461 at *3 ("There is a dual presumption that a potential intervenor's interests will be adequately represented where (1) the goals of the intervenor and the defendant are the same; and (2) the government is defending the validity of a statute and the intervenors are citizens who support the statute.").

Naile tries to rebut this presumption by pointing to tactical decisions made by state attorneys in two prior cases. *First*, Naile objects to a decision made 47 years ago by the defendants in *Newburger v. Peterson*, 344 F. Supp. 559, 562 n. 2 (D.N.H. 1972) not to argue that a state interest in preventing election fraud or preventing students from "overwhelming" a college community support a law restricting the franchise to only those with an intention to remain in town for an indefinite future. *Motion*, p. 21. *Second*, Naile disagrees with a tactical decision made by the defendant *Guare v. State*, 167 N.H. 658 (2015). *Motion*, p. 21. But "[w]here ultimate objectives are aligned, an intervenor can rebut the presumption of adequate representation by a showing of 'adversity of interest, collusion, or nonfeasance' or similar grounds," and Naile does not meet this burden. *N.H. Lottery Comm'n v. Bar*, 2019 U.S. Dist. LEXIS 47388, *9 (D.N.H. March 8, 2019) quoting *B. Fernandez & Hnos., Inc. v. Kellogg USA, Inc.*, 440 F.3d 541, 546 (1st Cir. 2006); *see also Resolution Trust Corp. v. City of Boston*, 150 F.R.D. 449, 454 (D. Mass. 1993) ("[A]ccording to the First Circuit, an individual has not demonstrated that the current governmental party's representation of her interest may be inadequate simply by virtue of the potential divergence between government and private interests."). Naile does not show that the State's decisions in those cases were anything other than appropriate tactical decisions, nor that

the State's tactics *in other cases* would somehow compromise the State's ability or drive to adequately defend the statute *in this case*. *Cf. Conservation Law Found., Inc. v. Mosbacher*, 966 F.2d 39, 44 (1st Cir. 1992) (explain that a party "sleeping on their oars" or discussing settlement may be enough to show inadequacy of representation). Indeed, had the State adopted and advanced Naile's arguments in *Newburger* and *Guare*, such arguments would have been frivolous, which is likely why the State did not make them in the first place.[3]

II. The Court Should Deny Naile's Request for Permissive Intervention

Permissive intervention is granted solely in the Court's discretion and is governed by Federal Rule of Civil Procedure 24(b), which provides: "On timely motion, the court *may* permit anyone to intervene who:… has a claim or defense that shares with the main action a common question of law or fact…" Fed. R. Civ. P. 24(b)(1)(B) (emphasis added). Permissive intervention is allowable where "(1) the applicant's claim or defense and the main action have a question of law or fact in common, (2) the applicant's interests are not adequately represented by an existing party, and (3) intervention would not result in undue delay or prejudice to the original parties." *In Re Thompson*, 965 F.2d 1136, 1142 n. 10 (1st Cir. 1992). "In evaluating a request for permissive intervention, the court can consider almost any factor rationally relevant." *Maine Republican Party v. Dunlap*, 2018 U.S. Dist. LEXIS 82461, *5 (D. Me. May 16, 2018) (citation and quotation

[3] *Guare* concerned a statute that added confusing, misleading language to the voter registration form: "In declaring New Hampshire as my domicile, I am subject to the laws of the state of New Hampshire which apply to all residents, including laws requiring a driver to register a motor vehicle and apply for a New Hampshire driver's license within 60 days of becoming a permanent resident." The language on the form was misleading, because, as the *Guare* Court explained, one could be a domiciliary entitled to vote and not a resident if one did not intend to remain indefinitely. Naile takes exception to the State's acknowledgement in *Guare* that the statute in question did not alter the statutory definitions of domicile or resident, or that the two terms had different definitions. But the State had to make those acknowledgements because to argue otherwise would have been frivolous. Indeed, the New Hampshire Supreme Court in *Guare* acknowledged this distinction which the State had to concede. *See Guare*, 167 N.H. at 662 ("The basic difference between a 'resident' and a person who merely has a New Hampshire 'domicile,' is that a 'resident' has manifested an intent to remain in New Hampshire for the indefinite future, while a person who merely has a New Hampshire 'domicile' has not manifested that same intent.").

omitted). "The denial of intervention as of right based on an intervenor's failure to overcome the presumption of adequate representation by the government cuts against the case for permissive intervention." *Id.*; *Tutein v. Daley*, 43 F. Supp. 2d 113, 131 (D. Mass. 1999) ("[W]here, as here, intervention as of right is decided based on the government's adequate representation, the case for permissive intervention diminishes, or disappears entirely.").

The Court should not grant Naile permissive intervention. As discussed, in Section II.B, above, Defendants and their attorneys will ably defend the constitutionality of the statute, rendering any input Naile may provide redundant. Further, permitting Naile, who is representing himself, to participate in the presentation of evidence and the taking of discovery will likely lead to additional confusion, delay, and burden in this voting-rights case with the Presidential Primary Election upcoming.[4] In this case, there is nothing to be gained by Naile's involvement except addition complexity and delay. Accordingly, the Court should deny his motion for permissive intervention under Rule 24(b).

III. Plaintiffs Have Standing

While styling his pleading as a motion to intervene, Naile includes in his prayer for relief a request that the complaint be dismissed for lack of standing. The argument, which is underdeveloped and based upon a misreading of the Complaint, is that "Plaintiff students in this present case have not shown they have standing to enjoin the legislative process or election laws in a state in which they have chosen not to become qualified voters." *Motion*, p. 7. This argument is wrong.

[4] The exact date has not been set to Plaintiffs' knowledge, but presumably it will be scheduled to occur in January or February, 2020.

First, Plaintiffs are qualified New Hampshire voters, contrary to Naile's contention. Plaintiffs allege in their complaint that they are domiciled in New Hampshire under RSA 654:1, I. *See* Compl. ¶¶ 1-2 (alleging plaintiffs are domiciled in Hanover, New Hampshire). Accordingly, they have voted in New Hampshire elections. *Id.* Because any domiciliary in New Hampshire is qualified to vote, any suggestion Plaintiffs have chosen not to become qualified is wrong. *See* RSA 654:1, I ("Every inhabitant of the state . . . shall have a right . . . to vote in the town, ward or unincorporated place in which he or she is domiciled"); RSA 654:1, I-a ("A student of any institution may lawfully claim domicile for voting purposes in the New Hampshire town or city in which he or she lives while attending such institution of learning if such student's claim of domicile otherwise meets the requirements of RSA 654:1, I.").

Second, Plaintiffs have standing to challenge HB 1264 because, by direct operation of that law, they will be required to get New Hampshire driver's licenses. Once effective on July 1, 2019, HB 1264 will change the definition of resident in RSA 21:6 to be, essentially, the same as the definition of domiciliary. As a result, per HB 1264, once a person who is domiciled in New Hampshire (but who does not have an intention to live in New Hampshire indefinitely) registers to vote on or after July 1, 2019, that person will now be declaring his or her legal "residency" under RSA 21:6, which triggers the obligation to, within 60 days of this registration, pay moneys to the State through car registration and driver's license fees if they own a car and/or drive. As a result, effective July 1, 2019, Plaintiffs, who are and will be registered to vote in New Hampshire, will become residents and required to get New Hampshire driver's licenses within 60 days by operation of HB 1264. *See* RSA 263:35.

"A court's inquiry into Article III standing contains the three following elements: a plaintiff must allege '[1] personal injury [2] fairly traceable to the defendant's allegedly unlawful conduct

and [3] likely to be redressed by the requested relief.'" *In re Nexium (Esomeprazole) Antitrust Litig.*, 968 F.Supp.2d 367, 403 (D. Mass. 2013) quoting *Allen v. Wright*, 468 U.S. 737, 751 (1984). In this case, Plaintiffs are personally injured by having to go to DMV (the closest DMV office to Dartmouth is in North Haverhill, which is 37 miles and a 44-minute drive away) and expend money to get a driver's license at a cost of $50, which is traceable to Defendants' enforcement of HB 1264, and which could be redressed by an injunction blocking HB 1264 from being enforced. As a result, Plaintiffs have standing. *See Gill v. Whitford*, 138 S. Ct. 1916, 1929 (2018) ("voters who allege facts showing disadvantage to themselves as individuals have standing to sue to remedy that disadvantage") (citation and quotation omitted); *Common Cause v. Rucho*, 218 F. Supp. 3d 777, 826-27 (M.D.N.C. 2018) (voters had standing to challenge partisan gerrymanders because they were in gerrymandered districts); *Crawford v. Marion Cty. Elect. Bd.*, 472 F.3d 949, 951 (7th Cir. 2007) (political party had standing to challenge voter ID law, standing of voters was "less certain" but did not need to be addressed) *aff'd* 553 U.S. 181, 189 n. 7 (2008); *Veasey v. Abbott*, 830 F.2d 216, 227 n. 8 (5th Cir. 2016) (*en banc*) (plaintiffs had standing to challenge a voter ID law).

CONCLUSION

For the reasons discussed above, the motion to intervene should be denied.

RELIEF REQUESTED

WHEREFORE, Plaintiffs respectfully requests that this Court:

A. Deny Edward Naile's Motion to Intervene (DN 11.0); and

B. Grant such other and further relief as this Court deems just and proper in the circumstances.

Respectfully submitted,

CAROLINE CASEY AND MAGGIE FLAHERTY,

By and through their attorneys affiliated with the American Civil Liberties Union of New Hampshire Foundation and the American Civil Liberties Union Foundation,

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CERTIFICATE OF SERVICE

The undersigned certifies that he has electronically filed this date the foregoing pleading with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all counsel of record. This filing is available for viewing and downloading from the ECF system. Undersigned further certifies that he has forwarded the foregoing pleading to Edward Naile by U.S. mail to 61 Tubbs Hill Road, Deering, NH 03224 and by email to ednaile@comcast.net.

Dated: March 20, 2019

/s/ Henry R. Klementowicz
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