UNITED STATES DISTRICT COURT
DISTRICT OF NEW HAMPSHIRE

LIBERTARIAN PARTY OF NEW HAMPSHIRE, Plaintiff, v. WILLIAM M. GARDNER, Secretary of State of the State of New Hampshire, in his official capacity, Defendant	Civil Case No. 1:14-cv-00322-PB

PLAINTIFF LIBERTARIAN PARTY OF NEW HAMPSHIRE'S MEMORANDUM OF LAW IN SUPPORT OF OBJECTION TO THE REPUBLICAN NATIONAL COMMITTEE'S AMENDED PARTIALLY ASSENTED-TO MOTION TO INTERVENE

NOW COMES the Plaintiff, the Libertarian Party of New Hampshire, by and through counsel, and objects to the Republican National Committee's ("RNC") Amended Partially Assented-To Motion to Intervene pursuant to Fed. R. Civ. P. 24(a) and (b) for the reasons below.

INTRODUCTION

On July 22, 2014, Plaintiff Libertarian Party filed this action facially challenging the sentence recently added to RSA 655:40-a by the New Hampshire General Court in House Bill 1542 ("HB 1542") stating that "[n]omination papers shall be signed and dated in the year of the election." HB 1542's added language to RSA 655:40-a prohibits the Libertarian Party from collecting the nomination papers necessary to obtain ballot access as a political party before January 1 of the general election year for which the Party is seeking placement on the ballot. This sentence, which became effective on July 22, 2014, is unconstitutional under the First and Fourteenth Amendments to the U.S. Constitution.

The RNC seeks intervention as of right pursuant to Fed. R. Civ. P. 24(a) or, in the alternative, permissive intervention pursuant to Fed. R. Civ. P. 24(b). At the outset, the motion should be summarily denied because it is untimely. Intervention would cause undue delay and prejudice, as well as increase the cost and expense of this litigation—especially where the RNC has made clear its intention to present evidence in discovery that obviously Plaintiff will need an opportunity to vet through document requests, interrogatories, and depositions. The RNC's Motion to Intervene was filed over eight (8) months after this case was filed, and the RNC makes no effort whatsoever to explain its delay. If the RNC sincerely wanted to participate in this case to defend RSA 655:40-a, it could have sought to intervene over eight (8) months ago when this case was filed and widely publicized in the press. Moreover, the current discovery deadline of April 17, 2015, which was extended only recently to accommodate outstanding depositions, is just eleven (11) days away. Plaintiff has already completed its discovery efforts, including having deposed the State's sole witness in the case—Deputy Secretary of State David Scanlan—on March 30, 2015. Given the upcoming discovery deadline, Plaintiff's summary judgment motion deadline of May 4, 2015, and the RNC's desire to present untested evidence to this Court, it cannot seriously be disputed that the RNC's eleventh-hour attempt to intervene in this case would, if successful, cause prejudice and disrupt the orderly disposition of this litigation—litigation which is on an expedited track given the Plaintiff's efforts to obtain ballot access during the 2016 general election.

The RNC's Motion should also be denied because the RNC has not identified a sufficient legal interest in the litigation and cannot demonstrate that its interests are distinct from or not fully represented by the State. The RNC's interest here is identical to the State where the RNC seeks to argue, just like the State, that RSA 655:40-a is constitutional. The Plaintiff does not

dispute that the RNC has an interest in supporting the election of Republican candidates nationally and that this political motivation may differ from the motivations of the State in defending against Plaintiff's challenge. But just because the RNC may have a different *motive* than the State in defending the challenged law does not mean that the RNC's *legal* interest is somehow different from the interests of the general public that the State is tasked in defending. *See Hollingsworth v. Perry*, 133 S. Ct. 2652, 2263 (2013) (proponents of an enacted ballot initiative "have no 'personal stake' in defending its enforcement that is distinguishable from the general interest of every citizen of [the State]"). Indeed, the RNC's *legal* interest here is no different than the interests of any other citizen interested in orderly administration of election and, thus, the State more than capable of defending its interests. The RNC's true legal interest in this litigation—the simple belief that RSA 655:40-a is constitutional—is simply not enough to warrant intervention into this case. This is especially true where discovery will end in eleven (11) days and where the RNC makes no credible contention that the Secretary of State and Attorney General's Office are incapable of zealously defending the challenged law.

Accordingly, the RNC's Motion to Intervene should be denied.[1]

ARGUMENT

I. The RNC May Not Intervene "As of Right" Because It Cannot Meet the Standard Under Rule 24(a)(2).

Federal Rule of Civil Procedure 24(a) provides, in pertinent part:

> (a) Intervention as of Right. On timely motion, the court *must* permit anyone to intervene who:
> …
> (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

[1] On April 1, 2015, the Court granted the RNC's initial Motion to Amend [21] Motion to Intervene. In issuing its Order, the Court stated "neither party objects." This was in error. Counsel for the Libertarian Party immediately brought this issue to the Court's attention and the Order was vacated.

> impair or impede the movant's ability to protect its interest unless existing parties adequately represent that interest.

Fed. R. Civ. P. 24(a) (emphasis added).

"[A] would-be intervenor must demonstrate that: (i) its motion is timely; (ii) it has an interest relating to the property or transaction that forms the foundation of the ongoing action; (iii) the disposition of the action threatens to impair or impede its ability to protect this interest; and (iv) no existing party adequately represents its interest. *Ungar v. Arafat*, 634 F.3d 46, 50-51 (1st Cir. 2011). The applicant bears the burden of demonstrating that he has met all four prongs of this conjunctive test. *Id.* at 51. If an applicant fails on any one prong of this test, he is not entitled to intervene as of right. *Id.* ("Each of these requirements must be fulfilled; failure to satisfy any one of them defeats intervention as of right."). The RNC's Motion fails with regard to the first, second, and fourth elements.[2]

A. The Motion is Untimely.

"As a general matter, the case law reflects four factors that inform the timeliness inquiry: (i) the length of time that the putative intervenor knew or reasonably should have known that his interests were at risk before he moved to intervene; (ii) the prejudice to existing parties should intervention be allowed; (iii) the prejudice to the putative intervenor should intervention be denied; and (iv) any special circumstances militating for or against intervention." *R&G Mortg. Corp. v. Fed. Home Loan Mortg. Corp.*, 584 F.3d 1, 7 (1st Cir. 2009). "Each of these factors must be appraised in light of the posture of the case at the time the motion is made." *Geiger v. Foley Hoag LLP Ret. Plan*, 521 F.3d 60, 65 (1st Cir. 2008); *see also R&G Mortg. Co.*, 584 F.3d at 7 (noting that the status of the litigation at the time of the request for intervention is "highly relevant" when examining the timeliness factors); *Banco Popular de Puerto Rico v. Greenblatt*,

[2] The RNC does not have a legally protectable interest in the subject matter of the litigation, so element (iii) is not applicable.

964 F.2d 1227, 1231 (1st Cir. 1992) (noting that the scrutiny attached to an intervention request intensifies in the latter stages of a case). If timeliness is, as both the RNC and First Circuit Court of Appeals both state, "the sentinel that guards the gateway to intervention," *see Candelario-Del-Moral v. UBS Fin. Servs. (In re Efron)*, 746 F.3d 30, 36 (1st Cir. 2014), then the RNC's Motion plainly fails when considering these factors.

First, the RNC never states in its Motion when it first learned of Plaintiff's lawsuit, nor does it make any effort whatsoever to explain its delay in seeking intervention until over eight (8) months after this case was filed on July 22, 2014. But even with these glaring omissions—which themselves are dispositive—the RNC reasonably should have known that its purported "interests" were at stake when this lawsuit was originally filed on July 22, 2014, as the filing of this case was widely publicized in the media at that time. *See R&G Mortg. Corp.*, 584 F.3d at 8 ("Perfect knowledge of the particulars of the pending litigation is not essential to start the clock running; knowledge of a measurable risk to one's rights is enough."). For example, counsel for Plaintiff, Attorney Gilles Bissonnette of the American Civil Liberties of New Hampshire, published an editorial in the *Union Leader*—New Hampshire's only statewide newspaper—explaining the lawsuit the day after it was filed. *See* Gilles Bissonnette, "To Keep Libertarians Off The Ballot, NH Violates Their Rights," *Union Leader*, (July 23, 2014), *available at* http://www.unionleader.com/article/20140723/OPINION02/140729658/0/SEARCH#sthash.5zn Cr08F.dpuf. There was also statewide coverage of the lawsuit on *New Hampshire Public Radio* and in the news pages of the *Union Leader* when the case was filed, as well as after this Court denied the State's Motion to Dismiss on December 30, 2014. *See* Michael Brindley, "N.H. Civil Liberties Union Suit Argues New Law Shuts Out Third Parties," *NHPR*, (July 22, 2014), *available at* http://nhpr.org/post/nh-civil-liberties-union-suit-argues-new-law-shuts-out-third-

parties; Dan Tuohy, "NH Faces Lawsuit Over New Election Law," *Union Leader*, July 22, 2014, *available at* http://www.unionleader.com/article/20140722/NEWS0605/140729670/0/SEARCH; "Libertarian Suit Over Ballot Access Gets Federal Court's OK," *Union Leader*, Dec. 30, 2014, *available at* http://www.unionleader.com/article/20141230/NEWS0621/141239863/0/SEARCH#sthash.sVBJhXi2.dpuf. Given this extensive press attention, the RNC should be presumed to have known about the lawsuit on or about July 23, 2014, especially given its sophistication and substantial resources. In light of this actual or constructive knowledge, this eight (8)-month delay is inexcusable. If the RNC sincerely wanted to participate in this case to defend RSA 655:40-a, it could have sought to intervene months ago when this case was in its infancy rather than disrupt these proceedings at the eleventh hour. Courts have rejected intervention where the delay was less severe. *See Banco Popular*, 964 F.2d at 1231-32 (rejecting 3-month delay); *R&G Mortg. Corp.*, 584 F.3d at 8-9 (2 and one-half month delay unreasonably late); *see also Candelario-Del-Moral v. UBS Fin. Servs. (In re Efron)*, 746 F.3d 30, 36 (1st Cir. 2014) ("[p]arties having knowledge of the pendency of litigation which may affect their interests sit idle at their peril").

<u>*Second*</u>, the prejudice to Plaintiff should intervention be allowed would be considerable, as it would prolong a case that is on an expedited schedule so the Plaintiff can appropriately plan for the upcoming 2016 general election. Here, the RNC's intervention would require an extension of the discovery deadline because the RNC intends to inject new "evidence and arguments relating to the burden imposed on political parties by requiring that signatures be gathered in the year of the election"—evidence and arguments that Plaintiff would obviously be

entitled to test in the discovery process to prevent unfair surprise.[3] *See* RNC Memo. at 11 (Doc. No. 30-1). Indeed, discovery is nearly complete. When the RNC filed its initial Motion (Doc. No. 21), the discovery deadline was a mere fourteen (14) days away, and the April 17, 2015 deadline agreed upon by the Plaintiff and Defendant is now just eleven (11) days away. Plaintiff has already completed its discovery efforts, including having deposed the State's chief witness in the case—Deputy Secretary of State David Scanlan—on March 30, 2015. Discovery is nearly over, with document discovery completed and depositions to be finalized by April 17. *See NAACP v. New York*, 413 U.S. 345, 367-68 (1973) (motion to intervene brought three weeks after intervenors' claim they learned of the suit, and only days after they learned of defendants' consent to entry of judgment, found untimely, because by that point the suit "had reached a critical stage" and the granting of intervention "possessed the potential for seriously disrupting the [Plaintiff] State's electoral process").[4]

And, as the Court explained during the January 28, 2015 status conference and the March 27, 2015 motion session, the current expedited schedule is important so that the Libertarian Party of New Hampshire can have its rights under the challenged law adjudicated promptly in advance of the upcoming 2016 general election. The longer this case is delayed—and the more of 2015 that elapses while the constitutionality of the challenged law remains in doubt—the more Plaintiff's claim that it is constitutionally entitled to engage in party petitioning in 2015 become moot for the upcoming general election. Thus, the intervention of the RNC will only delay this expedited schedule, thereby causing prejudice to Plaintiff. *R&G Mortg. Corp.*, 584 F.3d at 9

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[3] The RNC's conclusory claim that it will have relevant evidence seems particularly weak where neither the RNC nor the Republican Party of New Hampshire have apparently gone through the party-petitioning process in New Hampshire under RSA 655:40-a.

[4] This case is completely different from *Geiger v. Foley Hoag LLP Ret. Plan*, 521 F.3d 60, 64 (1st Cir. 2008), which is cited by the RNC and where "no action beyond the filing of the Amended Complaint had occurred" prior to the intervention request.

("One of the core purposes of the timeliness requirement is to prevent disruptive, late-stage intervention that could have been avoided by the exercise of reasonable diligence.").

Finally, a denial of the RNC's Motion will not prejudice the RNC because, as explained below, (i) the RNC does not have a "significantly protectable" interest in this case, and (ii) even if it did, this interest would be adequately represented by the Defendant and the Attorney General's Office. And even if such prejudice exists—which it does not—it would be of the RNC's own making given its excusable delay in seeking to intervene. Accordingly, the RNC's Motion is not timely.

B. The RNC Has Not Set Forth A Significant, Legally Protectable Interest That Will Be Affected or Impaired By This Litigation.

The RNC's asserted interest—namely, an interest in a "fair and honest" "election procedure," "in the enforcement of election laws generally," and in "how ballot access is determined and regulated"—is not legally-protectable here because it is too abstract and remote relative to the law Plaintiff is challenging. *See* RNC Memo. at 3, 6 (Doc. No. 30-1); *see also* RNC Mot. at ¶ 5 (Doc. No. 30).

The claim of an aspiring intervenor "must bear a sufficiently close relationship to the dispute between the original litigants." *Ungar*, 634 F.3d at 51-52 (quoting *Travelers Indem. Co. v. Dingwell*, 884 F.2d 629, 638 (1st Cir. 1989) (internal quotation marks omitted)). This interest must be a "significantly protectable" interest that is related to the subject of the action. *Donaldson v. United States*, 400 U.S. 517, 531 (1971); *see Pub. Serv. Co. of N.H. v. Patch*, 136 F.3d 197, 205 (1st Cir. 1998). "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*, 634 F.3d at 51-52 (citing *Travelers Indem.*, 884 F.2d at 638; *Moosehead Sanitary Dist. v. S.G. Phillips Corp.*, 610 F.2d 49, 53 (1st Cir. 1979)).

Here, the RNC's interest is too remote because the very procedure at issue in this case—namely, the party petitioning process under RSA 655:40-a—is not one that the Republican Party has used in the past or plans on using in the future in New Hampshire. *See* RNC Memo at 6 (Doc. No. 30-1). Under the party-petitioning process at issue in this lawsuit, "[a] political organization may have its name placed on the ballot for the state general election by submitting the requisite number of nomination papers, in the form prescribed by the secretary of state, pursuant to RSA 655:42, III." RSA 655:40-a. RSA 655:42, III, in turn, provides: "It shall require the names of registered voters equaling 3 percent of the total votes cast at the previous state general election to nominate by nomination papers a political organization." As the RNC's Motion acknowledges, the Republican Party does not need to go through this process in 2016 (and has never gone through this process) because, since it met the 4% threshold in 2014, it is already a recognized "party" under RSA 652:11.[5] Moreover, having never gone through the party-petitioning process under RSA 655:40-a, the RNC has nothing to unique to add to development of facts or arguments that would address the constitutionality of the challenged law. The RNC—an entity based out of Washington D.C.—(i) has no experience with the party-petitioning process in New Hampshire and thus cannot testify as to its burdensome nature, and (ii) had nothing to do with the drafting of the challenged law and therefore is unable to testify as to whether and why it is purportedly necessary.

Nor is this a case in which the specifics of the remedy sought could impair or impede the RNC's legal rights and responsibilities. Indeed, there is no indication in the RNC's Motion—

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[5] In this sense, this case is different than *Marshall v. Meadows*, 921 F. Supp. 1490 (E.D. Va. 1996), where a Senator attempted to intervene to address "*a procedure through which he is currently seeking election* and toward which he has expended considerable money and time." *Id.* at 1492 (emphasis added). Here, of course, there is no contention that the RNC intends to utilize the party-petitioning process under RSA 655:40-a. Nor is *Smith v. Board of Election Comm'rs*, 103 F.R.D. 161 (N.D. Ill. 1984) applicable. Unlike the RNC here, the *Smith* intervenors were, like some of the original plaintiffs in *Smith*, voters in a concrete election in which they could be denied the right to vote for specific identified candidates whom they supported.

because there cannot be—that a ruling in favor of Plaintiff will cause the RNC a legally cognizable injury in fact. This, once again, is because the RNC has no plans to go through the party-petitioning process. *See Coalition to Defend Affirmative Action v. Granholm*, 501 F.3d 775, 782 (6th Cir. 2007) ("Where … an organization has only a general ideological interest in the lawsuit—like seeing that the government zealously enforces some piece of legislation that the organization supports—*and the lawsuit does not involve the regulation of the organization's conduct*, without more, such an organization's interest in the lawsuit cannot be deemed substantial."). Of course, any perceived electoral benefit that the RNC may receive in not having to compete with Plaintiff Libertarian Party if the challenged law is upheld is not a legally cognizable injury that could remotely permit intervention. *See SEC v. Falor*, 270 F.R.D. 372, 376 (N.D. Ill. 2010) ("[T]he fact that you might anticipate a benefit from a judgment in favor of one of the parties to a lawsuit—maybe you're a creditor of one of them—does not entitle you to intervene in their suit.") (quoting *Flying J, Inc. v. Van Hollen*, 578 F.3d 569, 571 (7th Cir. 2009)).[6]

In short, in the absence of any allegation that the RNC will avail itself of the process under RSA 655:40-a, the RNC's generalized concern in "fair election procedures" is not specific to them and, in fact, is shared by all taxpayers and citizens. Thus, the RNC has no "significantly protectable" interest in this litigation, and their Motion fails. *See Manasota-88, Inc. v. Tidwell*, 896 F.2d 1318, 1322 (11th Cir. 1990) (denying denies intervention of right because potential impact on environmental wetlands obligations of applicant did not impart legally protectable interest due to fact that applicant's members do not discharge into wetlands); *Athens Lumber Co.*

[6] If it is the RNC's interest to defend the challenged law simply because it imposes unconstitutional burdens on the Plaintiff and therefore would ensure the primacy of the two-party system, this too would not be a significantly protectable interest. *See, e.g., Harris v. Pernsley*, 820 F.2d 592 (3d Cir. 1987) (district attorney who sought to intervene to prevent the enforcement of a jail population cap imposed as a remedy for overcrowding "can have no interest in assuring the incarceration of persons under unconstitutional conditions").

v. Federal Election Com., 690 F.2d 1364, 1366 (11th Cir. 1982) ("The sole basis of [IAM's] interest is general concern for the disproportionate corporate expenditures which may result if the FECA restrictions are lifted. IAM's alleged interest _is shared with_ all unions and _all citizens concerned about the ramifications of direct corporate expenditures_. Because this interest is so generalized it will not support a claim for intervention of right."); *League of United Latin Am. Citizens, Council No. 4434 v. Clements*, 884 F.2d 185, 188 (5th Cir. 1989) ("A 'legally cognizable interest' cannot be crafted out of Midland's purported interest in representing its county citizens."); *see also* 6-24 Moore's Federal Practice - Civil § 24.03 ("[N]on-property interests usually are not sufficient to support intervention as of right.").[7]

C. Any Interest The RNC Could Establish is Adequately Represented by the Secretary of State and the Attorney General's Office.

Even if the RNC's has a legally protectable interest in a "fair election procedure," then the RNC's Motion also fails because this interest is more than adequately represented by the Secretary of State and Attorney General's Office in this case. *See Daggett v. Commission on Governmental Ethics & Election Practices*, 172 F.3d 104, 111 (1st Cir. 1999) ("the case law is settled that the applicant for intervention must identify any inadequacy of representation").

Central to this analysis are two legal presumptions that apply here and that the RNC only cursorily addresses in its brief. The first presumption is that "adequate representation is presumed where the goals of the applicants are the same as those as the plaintiff or defendant." *Id.*; *see also United Nuclear Corp. v. Cannon*, 696 F.2d 141, 144 (1st Cir. 1982). Here, the RNC readily admits that it seeks the exact same outcome in this litigation as the State—to "defend[]

[7] The First Circuit Court of Appeals has not addressed whether an intervenor must establish Article III standing. In *Cotter v. Massachusetts Ass'n of Minority Law Enforcement Officers*, 219 F.3d 31, 33–34 (1st Cir. 2000), the Court explained that it is usually unnecessary to determine Article III standing with respect to an intervenor because, "in the ordinary case, an applicant who satisfies the 'interest' requirement of the intervention rule is almost always going to have a sufficient stake in the controversy to satisfy Article III as well." This question is unnecessary to address here as well, as the RNC does not satisfy the "significantly protectable" interest requirement.

[the] constitutionality of [the] amendment" that is the subject of this litigation. *See* RNC Mot. ¶ 2 (Doc. No. 30). And the RNC must also admit, though it attempts to avoid doing so, that its interest in a "fair election procedure" is shared by the Defendant Secretary of State's Office, which is tasked with the solemn responsibility of administering the State's election laws, opining on policy matters and proposing laws that implicate the fairness of elections, and defending those laws when they are challenged by litigants. Put another way, it is the Secretary of State's job and constitutional responsibility to defend and protect the very interest the RNC purportedly raises in this case. *See* http://sos.nh.gov/Elections.aspx.; *see also Tutein v. Daley*, 43 F. Supp. 2d 113, 129 (D. Mass. 1999) ("Examining the factors identified in *United Nuclear* reveals that the Secretary may adequately represent NAS' interests. To begin with, the Secretary and NAS have the same interest in upholding the September 1997 designation of ABT as 'overfished' based on stock level using the definitions in OLS.").

The second presumption 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." *Daggett*, 172 F.3d at 111; *see also Maine v. Dir., United States Fish & Wildlife Serv.*, 262 F.3d 13, 19 (1st Cir. 2001) ("Generally, our decisions have proceeded on the assumption, subject to evidence to the contrary, that the government will adequately defend its actions, at least where its interests appear to be aligned with those of the proposed intervenor."); *Massachusetts Food Ass'n v. Massachusetts Alcoholic Bevs. Control Comm'n*, 197 F.3d 560, 567 (1st Cir. 1999) ("the courts have been quite ready to presume that a government defendant will 'adequately represent' the interests of all private defenders of the statute or regulation unless there is a showing to the contrary"); *United Nuclear Corp.*, 696 F.2d at 144 (same). This presumption exists even if the

State assents to the RNC's Motion. *See Cotter v. Mass. Ass'n of Minority Law Enforcement Officers*, 219 F.3d 31, 35 (1st Cir. 2000).

To rebut these presumptions, the prospective intervenor typically may demonstrate, among other things, "adversity of interest, collusion, or nonfeasance." *United Nuclear Corporation v. Cannon*, 696 F.2d 141, 144 (1st Cir. 1982); s*ee also B. Fernandez & Hnos., Inc. v. Kellogg USA, Inc*., 440 F.3d 541, 546 (1st Cir. 2006); *Daggett*, 172 F.3d at 111; *Moosehead Sanitary District v. S.G. Phillips Corporation*, 610 F.2d 49, 54 (1st Cir. 1979). Here, the RNC has not identified any lack of diligence or meaningful divergence of interests by the Defendant or its counsel, who have vigorously defended this case to date, with every indication that they intend to continue doing so. The RNC has not made any argument that the Defendant has engaged in nonfeasance. The RNC has not made any assertions of collusion between Defendant and Plaintiff. The RNC has made no argument that the Secretary of State's Office neither has the means nor willingness to defend the challenged law robustly.

The history of this lawsuit further proves that the Defendant is fully capable of protecting its interests. The State filed a motion to dismiss in this case and, in so doing, demonstrated that it is willing to make any and all necessary arguments, and expend significant resources to do so. The RNC also does not contend that the State has omitted any legal arguments or will "sleep on its oars." *Tutein*, 43 F. Supp. 2d at 130 ("the quality and content of the Secretary's papers supporting the motion to dismiss amply demonstrate that he is energetically and actively pursuing this case"). And if there was any further doubt that the Defendant and its able counsel can adequately defend the challenged law, the Court need look no further than the RNC's legal argument defending the law. *See* RNC Memo. at 1-3 (Doc. No. 30-1). The RNC's argument is, in sum and substance, identical to the argument made by the State when it filed its Motion to

Dismiss. The RNC will not raise a different or novel legal argument in this case. Thus, the RNC has nothing to add to this case except delay, prejudice, and disruption to the Court's expedited schedule. *See United Nuclear Corp.*, 696 F.2d at 144 (noting that one factor is whether putative intervenor would add some necessary element to the proceedings not covered by the parties).

The RNC's only argument against the presumption of adequacy is to flip this presumption on its head by asking the Court to, under *Conservation Law Found., Inc. v. Mosbacher*, 966 F.2d 39, 44 (1st Cir. 1992), *presume inadequacy* simply because the RNC is subject to New Hampshire's election laws and therefore regulated by the Secretary of State's Office. *See* RNC Memo. at 9-10 (Doc. No. 30-1). This argument easily fails for multiple reasons. *First*, there no explanation in the RNC's Motion—because there is none—as to how the fact that the RNC is regulated by the Secretary of State's Office has any bearing on the ability of the Secretary to adequately defend the challenged law. This is because it has no bearing, and the RNC has produced no actual evidence indicating that this regulatory relationship would somehow render the State unable or unwilling to defend the challenged law. And even if the Secretary of State's regulatory responsibilities did have bearing in this case, they only confirm that intervention is inappropriate because one of these regulatory responsibilities includes defending challenged election laws like the one at issue here. *Second*, the First Circuit has expressly rejected the RNC's here position that, under *Mosbacher*, "the state defendant's representation is inadequate as a matter of course whenever it is also the regulator of the entity that seeks to intervene."[8] *Massachusetts Food Ass'n v. Massachusetts Alcoholic Bevs. Control Comm'n*, 197 F.3d 560, 567 (1st Cir. 1999). As the First Circuit explained:

[8] If this were true, it would dramatically expand the scope of Rule 24(a). Under the RNC's rationale, it could intervene as of right in every federal election-related case in every state because, in all such cases, (i) the RNC would have an interest in a "fair election procedure" and (ii) the Secretary of State would not be adequate given its regulatory and supervisory authority.

> The cases do not support such a per se rule. We certainly did not adopt such a rule in *Mosbacher*, where the intervenors overcame the presumption of adequate representation by the government defendant because, inter alia, the agency had not filed an answer to the complaint but had instead accepted a consent decree providing for virtually all the relief sought and subjecting the fishing groups to more stringent rules than had previously been in effect.[9]

Id. at 567. Unlike in *Mosbacher*, the RNC makes no contention here that the State has engaged in inaction that would prejudice its purported interests. *Finally*, the RNC's suggestion that the Defendant cannot adequately represent the RNC because the RNC's "interests are different in kind and degree from those of the New Hampshire Secretary of State," *see* RNC Memo. at 9 (Doc. No. 30-1), is both incorrect and conflicts with the RNC's repeated statement through its brief that its interest is, like the interest of the Secretary of State, in a "fair election procedure" and to defend the challenged law. What the RNC's statement here conflates is the difference between "interests" and "motive." The Defendant and the RNC clearly have the same "interests" in this case—to defend the constitutionality of the challenged law. But the Defendant and the RNC may have differing motives in desiring to achieve this interest where the RNC, unlike the Defendant, is separately motivated by the desire to run in and ultimately win elections. This separate "motive" is of no moment here. The interests of the Defendant and the RNC for the purposes of this litigation are the same, and the Defendant can, and is presumed to, adequately represent them. *See also Daggett*, 172 F.3d at 112 ("The general notion that the Attorney General represents 'broader' interests at some abstract level is not enough."); *Massachusetts*

[9] The remaining cases cited by RNC in support of inadequacy are either inapplicable or support Plaintiff's position For example, *B. Fernandez & Hnos., Inc. v. Kellogg USA, Inc*., 440 F.3d 541 (1st Cir. 2006), does not address a situation where a government actor is tasked with defending a law or policy, but rather addresses intervention in the context of a parent/subsidiary company relationship. And *Brook Vill. N. Assocs. v. Jackson*, No. 06-cv-046-JD, 2006 DNH 129 (D.N.H. Nov. 13, 2006) (DiClerico, J.), which does concern a government actor scenario, actually supports Plaintiff's position. There, the Court explained: "To the extent the Tenants seek to intervene simply to add their voices in support of HUD's defenses against Brook Village's declaratory judgment action, they have not shown that their assistance is needed. The Tenants and HUD share an interest in preventing Brook Village from prepaying the Section 236 loan and in preserving the rent supplement program that is currently in place. Therefore, the Tenants have not rebutted the presumption that HUD can adequately defend against Brook Village's declaratory judgment action." *Id.* at *8-9. The scenario here is identical.

Food Association v. Sullivan, 184 F.R.D. 217 (D. Mass. 1999) (noting that, "First Circuit precedent … suggests that the potential divergence of interests by itself is insufficient to overcome the dual presumptions … present in this case); *Resolution Trust Corporation v. City of Boston*, 150 F.R.D. 449, 454 (D. Mass. 1993) ("according to 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").

Accordingly, the RNC's Motion seeking intervention as of right fails.

II. The RNC Should Not Be Granted Permissive Intervention Under Fed. R. Civ. P. 24(b) Because Its Participation Would Cause Undue Delay and Prejudice and the State Would Adequately Address the RNC's Purported Interests.

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).

As previously discussed, the RNC fails to overcome the presumption that the Secretary of State and the Attorney General's Office may adequately represent its interest. It is clear from the RNC's submission that there is no position that it would advance that the Defendant and its able counsel would not. Simply put, the RNC has nothing to add to the legal debate. Furthermore, where, as here, intervention as of right is decided based on the government's adequate

representation, the case for permissive intervention diminishes or disappears entirely. *See Massachusetts Food Ass'n*, 197 F.3d at 568 (affirming denial of permissive intervention where there was adequacy of representation); *Menominee Indian Tribe of Wisconsin v. Thompson*, 164 F.R.D. 672, 678 (W.D. Wisc. 1996); *accord In Re Thompson*, 965 F.2d at 1142 n.10 (inasmuch as court concluded intervenors' interests were adequately represented, court deemed it "unnecessary to deal with the requisites for permissive intervention").[10]

Once again, the RNC's involvement would only cause prejudice and delay in this case for the same reasons stated above. Fed. R. Civ. P. 24(b)(3) (requiring consideration of "whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights"); *see also R & G Mortg. Corp.*, 584 F.3d at 11 ("[A] finding of untimeliness with respect to the former normally applies to the latter (and, therefore, dooms the movant's quest for permissive intervention."); *Banco Popular*, 964 F.2d at 1230 n.2. Here, the discovery deadline is only eleven (11) days away, and Plaintiff is currently preparing its motion for summary judgment due on May 4, 2015. In this case, there is nothing to be gained by the RNC's involvement except additional complexity and delay. Accordingly, the Court should deny the RNC's motion for permissive intervention under Rule 24(b).

CONCLUSION

For the reasons articulated above, this Court should deny the RNC's Motion to Intervene.

[10] The RNC's reliance on *Daggett v. Commission on Governmental Ethics & Election Practices*, 172 F.3d 104, 112 (1st Cir. 1999) in justifying permissive intervention is also to no avail. In *Dagget*, the Court only held that "the district court was not required to allow either intervention as of right or permissive intervention" based on the record presented and remanded the case for reconsideration in light of its clarification of *Moosehead Sanitary Dist. v. S.G. Phillips Corp*., 610 F.2d 49, 54 (1st Cir. 1979).

Respectfully submitted,

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Dated: April 6, 2015

CERTIFICATE OF SERVICE

I, William E. Christie, hereby certify that a copy of the foregoing document, filed through the CM/ECF system, will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF).

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Dated: April 6, 2015

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