THE STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS **SUPERIOR COURT**
SOUTHERN DISTRICT

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

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Hon. Charles S. Temple,
Presiding Justice