

THE STATE OF NEW HAMPSHIRE
SUPREME COURT

Case No. 2018-0208

PETITION OF NEW HAMPSHIRE SECRETARY OF STATE & A.

**EMERGENCY MOTION TO STAY PURSUANT TO
NEW HAMPSHIRE SUPREME COURT RULE 7-A**

In accordance with N.H. Supreme Ct. R. 7-A, the defendants, William M. Gardner, in his official capacity as the New Hampshire Secretary of State, and Gordon MacDonald, in his official capacity as the New Hampshire Attorney General, respectfully move to stay the order of the superior court issued on October 22, 2018,¹ which enjoined at least the use of a voter registration process and related forms prescribed by Senate Bill 3 (“SB 3”) (2017) in the upcoming November 6, 2018, general election². Because the injunction creates a risk of confusion and disruption among state election officials and enforcement officers, local election officials, and voters within two weeks of the November 6, 2018, general election, the defendants respectfully request that this court

¹ In accordance with N.H. Supreme Ct. R. 7-A(1), a copy of this order is appended to this motion as Exhibit A.

² The order does not say whether SB 3 as a whole is enjoined. Contemporaneously with filing this motion, defendants are seeking emergency clarification of the order from the superior court. See Exhibit D to this motion.

exercise its supervisory authority under New Hampshire Supreme Court Rule 11 to issue a stay of the superior court's order by October 26, 2018 on the following grounds³:

1. SB 3 became law in July 2017, with an effective date of September 8, 2017. The principal purpose of the bill was to limit the circumstances in which new registrants could rely on an affidavit alone to establish their domicile. The legislature expressly found that taking the registrant "at his or her word" created an opportunity for voter fraud. Order (October 22, 2018) (the "Order") at 30, citing Joint Exhibit ("JE") 3. It also found that disproving a claim of domicile by affidavit alone was "virtually impossible" because the statute defined domicile in terms of the registrant's "manifest[] intent." *Id.*; RSA 654:1, I (2012).

2. The bill modified the voter registration process in New Hampshire by requiring new registrants to provide evidence of a "verifiable act of domicile" where possible. RSA 654:12, I(c).

3. Under SB 3, if persons registering to vote within 30 days of an election or on election day know they possess documentary evidence of domicile, but fail to bring it

³ Due to the exigencies of the situation, the defendants are filing this stay within the existing docket associated with this case, *Petition of New Hampshire Secretary of State*, Case No. 2018-0208. In the event this Court requires a separate Rule 11 petition, or cannot treat this motion as a Rule 11 petition, the defendants will file a separate Rule 11 petition as soon as possible. The defendants expect to file a separate Rule 11 petition seeking review of the superior court's injunction order due to the uncertainty it creates for New Hampshire's electoral system. New Hampshire has operated under SB 3 for over a year. Now it appears SB 3 has been enjoined and cannot be used. If, in another year, this Court reverses the trial court's decision, SB 3 will be back in effect. If the reversal requires the superior court to address a particular issue or apply a different standard, then another superior court order will issue that may also be appealed. This year-to-year uncertainty is harmful to the stability and predictability of the State's election system and voter registration process.

with them when registering to vote, they can register to vote and cast a ballot on election day by agreeing to return the documentation within so many days after the election. RSA 654:12, I(c)(2)(A). If persons registering to vote within 30 days of an election or on election day are not aware of whether they possess documentary evidence of domicile at the time of registration, they may register and vote by signing an affidavit swearing to their claim of domicile. RSA 654:12, I(c)(2)(B).

4. In late August 2017, the plaintiffs filed suit challenging SB 3 as unconstitutional, in part, in violation of Part I, Article 11 of the New Hampshire Constitution, and shortly thereafter sought a preliminary injunction.

5. After a three-hour hearing on September 11, 2017, the superior court (Temple, J.) entered a temporary restraining order enjoining enforcement of the penalties associated with the statute's violation. The superior court also ordered the defendants to inform voters in upcoming elections, including one held on the day of the court's order, that those penalties had been enjoined.

6. Since that court order, the Secretary of State has held multiple training sessions for election officials throughout the state in preparation for the 2018 primary and general elections on how to register persons to vote under SB 3. Testimony of Orville Fitch, Trial Transcript, September 7, 2018 ("Exhibit B") at 38, lines 15-25.

7. More than 1,500 election officials have attended these trainings. Testimony of David Scanlan, Trial Transcript, September 6, 2018 ("Exhibit C") at 45, lines 12-17.

8. The Secretary of State's Office has also published and disseminated its bi-annual Election Procedure Manual, which provides detailed instructions on how to

register voters under SB 3 and upon which local election officials are encouraged to rely in administering elections. Exhibit B at 40-41, lines 18-6; at 42, lines 2-17, and Exhibit C at 46, lines 22-24.

9. The Secretary of State has also posted the Election Procedure Manual and other guidance for election officials on the website of the Department of State regarding how to register to vote under SB 3. Exhibit B at 40-41, lines 18-6.

10. The SB 3 voter registration process has been used by local election officials in all special elections, municipal elections, town elections, and in the 2018 state primary election since the fall of 2017, without incident.

11. On October 22, 2018, the defendants received the Order from the superior court enjoining SB 3, thereby altering the status quo of the existing voter registration process. Exhibit A (pages 12-35).

12. The order appears at first blush to enjoin SB 3 in its entirety, but then seems only to mandate the use of a specific pre-SB 3 form to use for election day registration on November 6, 2018. *Id.* at 35.

13. As a result, the defendants do not know what forms local election officials are permitted to use to register persons to vote prior to the November 6, 2018 election. Defendants and the local election officials they train and advise are left without clear direction as to whether certain provisions of SB 3 remain in effect for the November 6, 2018 election or whether they must revert to what the law was prior to the passage of SB 3 in administering the upcoming midterm election.

14. In this regard, the superior court's order fails to recognize the practical realities of disrupting the State's election system within two weeks of a major election. New registration forms need to be disseminated across the entire state in less than two weeks. In addition to preparing for the upcoming election, local election officials need to be instructed on the new form, what to do with it, and how to register persons to vote using it. And increased election monitoring efforts will need to be staffed and undertaken to resolve any confusion and errors that may occur on election day. Additional problems arise out of the superior court's order, as reflected in Exhibit D (pages 47-53) to this motion.

15. Given how thoroughly and carefully the State has prepared hundreds of election officials to register voters in accordance with SB 3, it is inevitable that local election officials, volunteer poll workers, and new registrants will be confused by such an abrupt and substantial departure from existing law.

16. In short, the superior court's order undoes, on the eve of a statewide election, the voter registration process that has been in effect for over a year and that state and local election officials have been trained to administer in the run up to and on the day of the November 6, 2018, general election.

17. It is well-settled that "[c]ourt orders affecting elections . . . can themselves result in voter confusion and consequent incentive to remain away from the polls. As an election draws closer, that risk will increase." *Purcell v. Gonzalez*, 549 U.S. 1, 4-5 (2006).

18. Thus, courts are typically required “to weigh, in addition to the harms attendant upon issuance or nonissuance of an injunction, considerations specific to election cases.” *Id.*; *Reynolds v. Sims*, 377 U.S. 533, 585 (1964) (in certain circumstances, “such as where an impending election is imminent and a State’s election machinery is already in progress, equitable considerations might justify a court in withholding the granting of immediately effective relief,” even when it may be considered necessary under applicable laws).

19. Even where a plaintiff may have a likelihood of success on the merits, injunctions issued on the eve of an election constitute extraordinary remedies that come laden with risks of their own. *See Colon-Marrero v. Conty-Perez*, 703 F.3d 134, 139-40 & n. 9 (1st Cir. 2012) (“We are not alone in holding that even where plaintiff has demonstrated a likelihood of success, issuing an injunction on the eve of an election is an extraordinary remedy with risks of its own.”).

20. Here, the superior court noted that it “is mindful of the close proximity of the midterm elections” but glossed over the disruptions its order may cause with the observation that the court “is confident that the Secretary of State’s office shall be able to ensure that the proper registration forms are distributed to all polling places throughout the state prior to the election.” Exhibit A at 35. This casual dismissal of the complexities associated with preparing for and holding an election does not give serious consideration to the obstacles an eleventh-hour court order presents in preparing for and running an orderly election of significant magnitude.

21. The Supreme Court should also be aware that there is also substantial reason to question the validity of the superior court’s order on the merits. For example, despite quoting the statement of intent of the House Election Law Committee in its recommendation that SB 3 in its final form ought to pass, the superior court disregarded this explicit statement of the rationale for the change of law in determining that the statute does not actually address the “interest set forth” by the legislature. Exhibit A at 29 and 30.

22. The superior court assumed that prevention of “voter fraud and wrongful voting” *in general* was the purpose of SB 3. *Id.* at 31-32. The legislature stated explicitly, however, that the purpose of the statute was to eliminate the risk of voter fraud created by taking the registrant’s word for it that he or she was domiciled in that town or ward. *Id.* at 30 (quoting statement of intent). SB 3 addressed this narrow, specific state interest by requiring new registrants – where possible – to provide some evidence that they have taken some action consistent with the assertion of domicile, thereby verifying that assertion to some degree. RSA 654:12, I(c). The superior court also determined that “improving confidence in New Hampshire’s election system is not a significant State interest that justifies placing burdens on voters.” Exhibit A at 33. The superior court reached these conclusions without citation to any authority and without regard to the recent *Opinion of Justices*, __ N.H. ___, 191 A.3d 1245, 1258 (N.H. 2018), wherein the Justices recognized that laws which promote public confidence and guard against voter fraud advance legitimate and important government interests. Because the superior court disregarded two critical state interests, it failed to properly apply the required balancing

test to SB 3. Exhibit A at 29 (*citing Guare v. State*, 167 N.H. 658 (2015)). For this reason alone, the superior court's order is defective.

23. The defendants are simultaneously with this motion seeking clarification of the superior court's order or, alternatively, a stay of that order. A copy of the motion is attached as Exhibit D (pages 47-53). Local election officials have already contacted them with questions regarding the trial court's order and the defendants have been unable to provide clear, definitive guidance. Defendants need either the superior court's order to be stayed or need to obtain substantial clarification on the effects of the order quickly in order to avoid as many problems as possible in the lead up to the election and on election day.

24. Consequently, this case presents the type of extraordinary circumstances that justify departing from the rule that the superior court must decide a motion to stay in the first instance before such a motion is filed with this Court.

25. Additionally, for the relief sought by this motion to be effective, the defendants respectfully request that the court issue an order granting or denying it by October 26, 2018. Delaying a decision beyond that date would itself create unacceptable uncertainty in the week before the election.

26. Because the trial court's order is causing, and is likely to continue to cause, confusion among election officials and voters and creates an unwarranted disruption of the State's electoral system, this court should exercise its supervisory authority in this case and stay implementation of the trial court's order.

Respectfully submitted,

WILLIAM M. GARDNER,
SECRETARY OF STATE and

GORDON MACDONALD,
ATTORNEY GENERAL

By Their Attorneys,

Date: 10/24/18

/s/Signed by Bryan K. Gould w/permission of Anne M. Edwards

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CERTIFICATE OF SERVICE

I hereby certify that the within pleading is being served electronically upon counsel listed below through the court's ECF system:

Anthony Galdieri, Esq., Steven J. Dutton, Esq., Wilbur A. Glahn, III, Esq., and William E. Christie, Esq.

I also certify that the within pleading is being sent via e-mail transmission to the following counsel:

Anne M. Edwards, Esq., Paul J. Twomey, Esq., John M. Devaney, Esq., Bruce V. Spiva, Esq., Marc E. Elias, Esq., Amanda R. Callais, Esq., S. Amy Spencer, Esq., James S. Cianci, Esq., and Richard J. Lehmann, Esq.

Date: 10/24/18

/s/ Bryan K. Gould
Bryan K. Gould, Esq.

LIST OF EXHIBITS

Exhibit A

October 22, 2018, Notice of Order on Preliminary Injunction and Order of the Hillsborough Superior Court Northern District (Brown, J.) 12-35

Exhibit B

Excerpts from Transcript of Preliminary Injunction Hearing (September 7, 2018), Testimony of Orville B. Fitch 36-42

Exhibit C

Excerpts from Transcript of Preliminary Injunction Hearing (September 6, 2018), Testimony of David Scanlan 43-46

Exhibit D

Emergency Motion for Status Conference (filed with the Hillsborough Superior Court Northern District on October 24, 2018)..... 47-53

**THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH
SUPERIOR COURT**

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October 22, 2018

FILE COPY

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

You are hereby notified that on October 21, 2018, the following order was entered:

RE: ORDER ON PRELIMINARY INJUNCTION

See copy of Order attached. (Brown, J.)

W. Michael Scanlon
Clerk of Court

(923)

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

THE STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS.
NORTHERN DISTRICT

SUPERIOR COURT

League of Women Voters of New Hampshire, et al.

v.

William M. Gardner, et al.

Docket No. 226-2017-CV-00433

ORDER

Plaintiffs have brought this action seeking to overturn legislation amending New Hampshire's voter registration process commonly known as Senate Bill 3 ("SB3"). Specifically, plaintiffs allege that SB3 violates the constitution by burdening the right to vote (Count I), contradicting the domicile qualification (Count II), violating equal protection (Count III), and being void for vagueness (Count IV). Plaintiffs have moved for a preliminary injunction to enjoin enforcement of SB3 for the upcoming midterm elections. The Court held a hearing from August 27 through September 7, 2018. Thereafter, the parties submitted requests for findings of fact and rulings of law on September 24, 2018. Upon consideration of the evidence, the parties' arguments, and the applicable law, the Court finds and rules as follows.

Factual Background

In 2017, thirteen Republican state senators sponsored SB3, a bill intended to amend the law to include stricter requirements for proving one's domicile when registering to vote. At the time, an individual could register to vote without presenting

any proof of his or her domicile; the voter only needed to fill out a form listing his or her domicile address and sign an affidavit swearing that the information was true and accurate. That affidavit, in its entirety, read as follows:

If this form is used in place of proof of identity, age, citizenship, or domicile, I hereby swear that such information is true and accurate to the best of my knowledge.

This form was executed for purposes of proving (applicant shall circle yes or no and initial each item):

Identity	Yes/No	_____	(initials)
Citizenship	Yes/No	_____	(initials)
Age	Yes/No	_____	(initials)
Domicile	Yes/No	_____	(initials)

(Joint Exhibit ("JE") 9.)

SB3 altered the voter registration process in two significant ways. First, it created a distinction between registrations occurring more than thirty days before an election and those occurring within thirty days and on election day. New voters who seek to register more than thirty days before an election must present documentation proving they are domiciled in the appropriate town or ward or they will be turned away. Those who seek to register within thirty days of an election or on election day are not required to have documentation with them in order to vote, but they must fill out the second page of the Voter Registration Form ("Form B").¹

Form B is the second major change to the registration process. In order to prove domicile, a new voter without documentation is required to select one of two options.

The first option ("Option 1") reads as follows:

I understand that to make the address I have entered above my **domicile** for voting I must have an intent to make this the one place

¹ For ease of reference, any mention of Form B in this order refers to the second page of the form, as the first page is largely unchanged from prior years.

from which I participate in democratic self-government and must have acted to carry out that intent. I understand that if I have documentary evidence of my intent to be domiciled at this address when registering to vote, I must either present it at the time of registration or I must place my initials next to the following paragraph and mail a copy or present the document at the town or city clerk's office within 10 days following the election (30 days in towns where the clerk's office is open fewer than 20 hours weekly).

___ By placing my initials next to this paragraph, I am acknowledging that I have not presented evidence of actions carrying out my intent to be domiciled at this address, that I understand that I must mail or personally present to the clerk's office evidence of actions carrying out my intent within 10 days following the election (or 30 days in towns where the clerk's office is open fewer than 20 hours weekly), and that I have received the document produced by the secretary of state that describes the items that may be used as evidence of a verifiable action that establishes domicile.

Failing to report and provide evidence of a verifiable action will prompt official mail to be sent to your domicile address by the secretary of state to verify the validity of your claim to a voting domicile at this address.

(JE 11.) The second option ("Option 2") states:

___ By placing my initials next to this paragraph, I am acknowledging that I am aware of no documentary evidence of actions carrying out my intent to be domiciled at this address, that I will not be mailing or delivering evidence to the clerk's office, and that I understand that officials will be sending mail to the address on this form or taking other actions to verify my domicile at this address.

(Id.) The form also retains the balance of the affidavit used the previous year, containing the following in the lower left corner:

This form was executed for purposes of proving (*applicant shall circle yes or no and initial each item*):

Identity	Yes/No _____	(initials)
Citizenship	Yes/No _____	(initials)
Age	Yes/No _____	(initials)

(Id.)

Voters who select Option 1 are provided a separate form titled “Verifiable Action of Domicile.” This form states that “[t]he following checklist shall be used as a guide for what you may use as evidence and shall be submitted to the town or city clerk along with documentation that you are required to provide.” (JE 12.) It then presents a list of examples of documents that would serve as documentation proving one’s domicile, only one of which is necessary to return to the clerk’s office. The form must be returned with the chosen documentation “by mail or in person” within ten or thirty days as specified above.

In addition to the foregoing, SB3 also extended the existing penalties for wrongful voting set forth in RSA 659:34 to three new categories of conduct specific to SB3: (1) presenting falsified proof of domicile or verifiable action of domicile; (2) providing false information in a written statement to prove that another is domiciled at a particular address; and (3) failing to provide follow-up documentation if choosing Option 1.

SB3 passed the senate along strict party lines, and passed the house largely along party lines. Governor Sununu signed the bill into law on July 10, 2017, and it became effective September 8, 2017. Prior to the statute becoming effective, plaintiffs initiated the present lawsuit, arguing the law was unconstitutional as it would effectively suppress voter turnout. On September 12, 2017, the Court (Temple, J.) preliminarily enjoined enforcement of the criminal and civil penalties associated with SB3.

Analysis

As an initial matter, defendants have repeatedly argued that plaintiffs lack standing to bring the present action. The Court disagrees. In an order issued on April 10, 2018, the Court (Temple, J.) conducted an analysis of plaintiffs’ standing and

concluded that they had standing to bring this action. (See Court Index #59 at 3–9.) Following the preliminary injunction hearing, the Court finds defendants have failed to provide any justification to disturb that ruling.

Plaintiffs seek a preliminary injunction in order to prevent the use of the domicile affidavit created by SB3 in advance of a final hearing on the merits. “The granting of an injunction is a matter within the sound discretion of the Court exercised upon a consideration of all the circumstances of each case and controlled by established principles of equity.” DuPont v. Nashua Police Dep’t, 167 N.H. 429, 434 (2015). “The issuance of injunctions, either temporary or permanent, has long been considered an extraordinary remedy.” N.H. Dep’t of Env’tl. Servs. v. Mottolo, 155 N.H. 57, 63 (2007). “A preliminary injunction is a provisional remedy that preserves the status quo pending a final determination of the case.” Id. (citing Kukene v. Genualdo, 145 N.H. 1, 4 (2000)). “An injunction should not issue unless there is an immediate danger of irreparable harm to the party seeking injunctive relief, and there is no adequate remedy at law.” Id. “Also, a party seeking an injunction must show that it would likely succeed on the merits.” Id. Finally, the public interest must not be adversely affected by the granting of the preliminary injunction. Thompson v. N.H. Bd. of Med., 143 N.H. 107, 108 (1998).

In order to determine the likelihood of plaintiffs’ success on the merits, the Court must determine the applicable standard of review to apply to its evaluation of SB3. “Although the right to vote is fundamental, [the Court] do[es] not necessarily subject *any* impingement upon that right to strict scrutiny.” Guare v. State, 167 N.H. 658, 663 (2015). “Instead, [the Court] applies a balancing test to determine the level of scrutiny that [it] must apply.” Id. “Under that test, [the Court] weigh[s] the character and

magnitude of the asserted injury to the voting rights sought to be vindicated against the precise interests put forward by the State as justifications for the burden imposed by its rule, taking into consideration the extent to which those interests make it necessary to burden the plaintiff's rights." Id. "Under this standard, the rigorousness of [the Court's] inquiry into the propriety of a state election law depends upon the extent to which a challenged regulation burdens the fundamental right to vote." Id. When voting rights are subject to severe restrictions, strict scrutiny applies and "the regulation must be narrowly drawn to advance a state interest of compelling importance." Id. Where restrictions are reasonable and nondiscriminatory, however, "the State's important regulatory interests are generally sufficient to justify the restrictions." Id. "Most cases fall between these two extremes." Id.

"Courts in other jurisdictions have recognized that a test similar to intermediate scrutiny applies to a voting restriction that falls between the two extremes." Id. at 666. "Our intermediate level of scrutiny requires that a challenged law be substantially related to an important government objective." Id. at 665. The State bears the burden under this level of review, and "may not rely upon justifications that are hypothesized or invented *post hoc* in response to litigation, nor upon overbroad generalizations." Id. Where a law imposes unreasonable restrictions on the right to vote, "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.

I. Burdens Imposed by SB3

The most immediately apparent characteristic of Form B, when considering its purpose, is its length and complexity. In stark contrast to the simplicity of the domicile affidavit successfully used in the 2016 general election, Form B contains hundreds of words spread over six paragraphs. As demonstrated below, SB3's forms are drafted in a manner that makes them confusing, hard to navigate and comply with, and difficult to complete in a timely manner.

A. Complexity of Language

A number of New Hampshire college students testified to being confused and intimidated by the forms. Among their concerns was a general uncertainty regarding what to put on the form for their domicile address, as they all received mail at a location separate from their dormitories and did not know the physical address of their living spaces. Two witnesses noted concerns with Option 1—which states that if the registrant fails to send in appropriate documentation, official mail will be sent to the domicile address listed on the form—because students cannot receive mail at their domicile addresses. Further, a student at Dartmouth testified that during the week after the general election students will be studying for and taking finals, followed by Thanksgiving and a six-week break. In addition, she testified that many students transfer dorms after returning from winter break. Therefore, even if mail were delivered to the dormitories, it still may not reach the student. Students aware of these complications may very well be dissuaded from voting out of fear of being subject to the substantial fines that could be incurred for failing to comply with the statute.

Dr. Deborah Bosley, an expert in plain language and readability, conducted an analysis of the text of Form B, as well as the verifiable action of domicile form, utilizing four methodologies: (1) a readability test, which is an algorithm-based analysis of the grade level necessary to understand the text and ease of understanding; (2) a comparison of the existing language with best practices in plain language; (3) usability testing, which consisted of one-on-one interviews with intended users; and (4) an expert review.

Dr. Bosley's readability test scored readability on a scale of 0–100, with 100 being equivalent to a comic book, 60–70 equivalent to a local newspaper, and 0–30 equivalent to the Harvard Law Review. The results are based upon the average number of words, the number of syllables per word, the average number of words per sentence, and the number of sentences.

In performing her analysis, Dr. Bosley separately tested both Option 1 on Form B and the entirety of Form B. The tested paragraph of Option 1 consists of a single sentence containing just over 100 words. Dr. Bosley testified that the ideal sentence should contain only 12–25 words. Option 1's readability score was below 0. Form B as a whole has an average sentence length of 72 words and its reading score was also below 0. Dr. Bosley testified that the readability scores alone indicated that the forms would be incredibly difficult for the average adult to read and understand.

Dr. Bosley performed the same analysis on the verifiable action of domicile form. For the entire form, the average sentence length is 31 words, the grade level of the text was 17 (equivalent to that of a first-year graduate student), and the readability score approached 30. Dr. Bosley also tested the second to last paragraph of the form, which

instructs the reader what to do if they do not have any of the listed documents. The paragraph is 97 words long, had a grade level of 23 (equivalent to that of a doctoral candidate), and its readability score was 16.32. Therefore, as with Form B, the analysis demonstrated that the verifiable action of domicile form would be very difficult for the average adult to read and understand, as the average adult in the United States reads at an eighth grade level. Consistent with the foregoing, Dr. Bosley testified that both forms fail to meet many of the best practices in the field of plain language.

Dr. Bosley also conducted usability testing with 12 participants² consisting of 7 college students, several part-time workers, and some full-time workers, all aged between 18–29 years old. The participants found some of the forms' words or phrases confusing, such as "domicile," "verifiable action," and "democratic self-government." (See JE 43B at 198, 264, 316, 348.) The participants also found the forms difficult to navigate. (See *id.* at 193, 262–65, 316–19.) Although the State argued that Dr. Bosley prompted some of the participants with leading questions, this does not invalidate the entirety of the testing, as there are many instances of confusion recorded without any such leading questions.

In addition to the foregoing, some of the forms' language is inherently confusing or misleading. For example, although the State repeatedly described the verifiable action of domicile form as a general, non-exhaustive guideline, the form states: "To establish that you have engaged in a verifiable act establishing domicile, provide evidence that you have done at least one of the following." (JE 12.) This may lead an individual who does not have documentation that exactly matches the provided list to

² Dr. Bosley testified that research by others in the field has indicated that 12 test subjects should result in the discovery of approximately 96% of the issues in a given document.

believe that he or she cannot comply with it. Indeed, a number of college students testified that they did not believe they had anything that met the descriptions of any item on the list. Further, multiple witnesses testified that the ultimate decision of what constitutes acceptable proof is up to the discretion of the town clerk and/or the poll worker at the polling location. Thus a new registrant could be informed at a polling location that a certain document would be sufficient, but that document could later be rejected by the town clerk when submitted. Finally, all of the foregoing confusion will only be compounded when combined with the stress of trying to understand the forms while standing at the head of a line of potentially hundreds of voters waiting their turn.

B. Impact on Lines

Given the increased complexity and confusion surrounding the new forms, particularly in comparison to the 2016 domicile affidavit, the average registration time is expected to increase, resulting in longer lines and delays at polling places. The Court heard testimony from Dr. Muer Yang regarding the increase in wait times that would result under SB3. Dr. Yang is a queueing expert that applied Queueing Theory to this case. Queueing Theory is a mathematical model that looks at three factors (arrival rate, service rate, and number of servers) to describe the behavior of queueing systems. For this case, Dr. Yang interviewed local election officials to obtain estimates of the average time it took to register voters in the 2016 general election. Those estimates ranged from a low of 2–3 minutes in Keene Ward 1 to a high of 5–15 minutes in Londonderry. (JE 42 T1.) Dr. Yang testified that the same officials estimated SB3 would add another 2–5 minutes per person. Using these numbers, Dr. Yang created a variety of charts demonstrating estimated wait times under SB3 assuming different variables, such as:

number of registrants, number of servers, percentage of registrants who have no proof of domicile, and additional time needed to complete Form B.

For example, assuming an average registration time of 5 minutes for people with proof of domicile and an additional 2.5 minutes needed for those without such proof, a polling place that saw 500 same-day registrants with 4 servers could expect wait times of 12 minutes if 10% of registrants lacked proof of domicile. (JE 42 T4.) Waiting times at that same polling place would reach 56.9 minutes if 25% of registrants lacked proof of domicile. (Id.) Using the same registration times, a polling place that saw 3,000 same-day registrants with 22 servers could expect wait times of 40.7 minutes if 10% of registrants lacked proof of domicile, whereas the queue would be overloaded and the line would become effectively infinite if only 15% of registrants lacked proof of domicile. (Id.)

Not surprisingly, the longer registration takes under SB3, the more drastic the increases in wait times will be as the number of registrants needing to use Form B rises. For example, assuming an average registration time of 5 minutes per person with proof of registration and an additional 5 minutes needed for those without such proof, a polling place that saw 500 same-day registrants with 4 servers could expect wait times of 12 minutes if only 5% of registrants lacked proof of domicile. (JE 42 T5.) However, wait times would increase at that same polling place to over 800 minutes if only 15% of registrants lacked proof of domicile. (Id.) A polling place that saw 3,000 same-day registrants could expect 40-minute wait times if only 5% of registrants lacked proof of domicile, and the queue would be overloaded at 10% or higher. (Id.)

Importantly, Dr. Yang cautioned that Queueing Theory has a tendency to *underestimate* wait times. This is due to the fact that the theory assumes the arrival process maintains a consistent rate, which is generally not reflected in reality. Dr. Yang testified that in voting situations, there are peaks and valleys as people arrive at irregular intervals, and variability in arrival will create lines. Anne Shump, Chairman of the Supervisors of the Checklist in Durham, testified that a huge number of people arrived between 4:00 and 7:00 p.m. during the 2016 general election, including approximately half of all new registrants for that election.

Deputy Secretary of State David Scanlan testified that the State defines “long lines” as those with a wait time in excess of 15 minutes. Many polling places throughout New Hampshire have already experienced long lines in prior elections, even those using the simplified 2016 registration form. (See Pls.’ Ex. 49 at 5278 (30-minute wait during 2016 presidential primary in Plymouth); id. at 5965 (20–30-minute wait in Manchester Ward 12 in 2016 general election); id. at 6100 (30-minute wait in Wakefield in 2016 general election).) Moreover, not only did multiple witnesses testify about voters being generally discouraged from voting due to long lines, but the phenomenon of voters leaving polling places due to long lines has been documented in official correspondence to the State. (See Pls.’ Ex. 18, 20, 25.)

The State argues that Dr. Yang’s projections are unreliable because he obtained his numbers from a small number of election officials that were selected by plaintiffs’ counsel. However, the numbers utilized in the charts discussed above regarding average registration time are not speculation; the registration times at certain locations during an election on November 7, 2017, were officially documented and demonstrated

an overall average time of 4.8 minutes. (Pls.' Ex. 7.) Moreover, Dr. Yang's estimates about the additional time needed to read and complete Form B are reasonable given the form's length and complexity. Finally, even accepting some variability in the numbers, Dr. Yang's analysis demonstrates that the margin for error is small. The number of staff recruited for the elections is largely based on estimates of voter turnout. Thus, if turnout is higher than anticipated, even by relatively small amounts, the situation can quickly become unmanageable regardless of the amount of preparation.

The State also argues that any issues raised by Dr. Yang can be addressed by proper staffing. At the hearing, the evidence and witness testimony indicated that the Attorney General's office and the Secretary of State's office both put great effort into ensuring that elections are conducted fairly and efficiently. The Court has no doubt that these entities would operate in good faith to minimize the negative impact of SB3. However, despite their best efforts, the Court is not convinced that the State will necessarily be able to meet these needs. Ms. Shump testified that due to time constraints for training volunteers, mistakes are made all the time. Ms. Shump also testified that the current polling place in Durham is maxed out at 28 staff members and there is simply insufficient physical space for additional poll workers. Karen Freitas, the Town Clerk in Plymouth, testified that due to the changes in forms it has been difficult to recruit a sufficient number of poll workers as there is an increased fear of making mistakes. She also testified that she has not conducted a formal training for poll workers in Plymouth on SB3, and that they will likely get a brief overview of the new form a mere 5–10 minutes before the polls open. Finally, as noted above, the State has

a history of experiencing long lines at many locations for many years, even during the 2016 election which saw the most streamlined version of the domicile affidavit.

Therefore, upon consideration of the foregoing, the Court believes that SB3 will result in potentially significant increases in waiting times at polling places throughout the state, particularly those with larger turnout.

C. Disparate Treatment

Plaintiffs have also presented credible testimony that the negative impact of SB3 will be greater for certain groups of people. Utilizing data from the New Hampshire Secretary of State and the American Community Survey produced by the United States Census Bureau, Dr. Herron³ performed a bivariate analysis demonstrating that towns with higher populations of individuals of certain groups—specifically youth between the ages of 18–24, highly mobile individuals, and those of low socioeconomic status—all experienced higher rates of same-day registration. A multivariate analysis also demonstrated that undeclared voters and Democrats utilized same-day registration at a significantly higher rate than Republicans. These groups would be exposed to Form B at higher rates and therefore experience greater negative impact.

Other specific populations would also experience disproportionate burdens under SB3. The homeless will be unfairly burdened given the uncertain nature of their domicile. These individuals are often highly transient and may live in a variety of locations in a short period of time, such as at a friend's house, a homeless shelter, or on

³ Prior to the hearing, the State objected to the reliability of the methodologies employed by Dr. Herron pursuant to RSA 516:29-a, and in doing so retained a rebuttal expert. However, the State elected not to call their expert at the hearing and proceeded solely by cross-examination. Therefore, the State's challenges go to the weight of Dr. Herron's testimony and not its admissibility. The Court found Dr. Herron to be a well-qualified expert witness and finds the conclusions referred to herein to be reliable and adequately supported in the record.

the street. This would make it difficult, if not impossible, for them to comply with Option 1, and equally difficult for the State to perform its follow-up under Option 2. In addition, the physically disabled could be unfairly burdened due to the simple fact that they may be unable to stand in the longer lines caused by Form B.

Furthermore, not all polling places see similar voter turnout. Certain locations, particularly college towns such as Hanover and Durham, see turnout in the high thousands, whereas other locations are in the low hundreds. For example, Ms. Shump testified that Durham had close to 10,000 voters for the 2016 presidential election, 3,000 of which were new registrants utilizing same-day registration. As demonstrated by Dr. Yang, these high-turnout locations are much more likely to be impacted by the increased registration times caused by SB3, leading to a disparate impact on voters throughout the state.

As a general counter to the foregoing, the State argues that SB3 has been in place since 2017 for over 200 local and special elections without issue. However, these elections experience significantly lower turnout than statewide general elections. As an example, Ms. Shump testified that town elections in Durham usually see approximately 20 new voters with 1,000 total votes cast. Louise Spencer, who served as a deputy registrar for the Manchester mayoral primary and special election in 2017, testified that she registered a total of 15 people for that election, and Ms. Shump testified that an election in March 2018 saw only three new registrants, none of whom needed to use the domicile affidavit. In contrast, Ms. Shump testified that she anticipates a large turnout for the upcoming midterms, expecting 4,000–5,000 voters and between 1,000–2,000

new registrants at her polling place in Durham. Therefore, the success of SB3's new Form B in local elections has little relevance to elections that see much higher turnout.

Part 1, Article 11 of the New Hampshire Constitution guarantees that “[a]ll 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.” Further, “[v]oting registration and polling places shall be easily accessible to all persons including disabled and elderly persons who are otherwise qualified to vote.” Id.

The right to vote is protected in more than the initial allocation of the franchise. Equal protection applies as well to the manner of its exercise. Having once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person's vote over that of another. It must be remembered that the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise.

Bush v. Gore, 531 U.S. 98, 104–05 (2000).

Courts have found that unreasonable delays can result in unconstitutional deprivations of the right to vote. In Ury v. Santee, 303 F. Supp. 119 (N.D. Ill. 1969), the Village of Wilmette in Illinois reduced the number of polling precincts from 32 to 6. While the six consolidated precincts were comparatively equal in geographic area, they “were substantially unequal in terms of numbers of registered voters included in each precinct.” Id. at 122. As a result, extensive lines and traffic jams formed on election day. Id. at 124. The Court found that “United States citizens do have a right guaranteed by the Constitution to a reasonable opportunity to vote in local elections, that is, to be given reasonable access to the voting place, to be able to vote within a reasonable time and in a private and enclosed space.” Id. at 126. “As a consequence of the failure of defendants to provide adequate voting facilities, plaintiffs and those

similarly situated were hindered, delayed and effectively deprived of their rights . . . to vote” and “were discriminated in the exercise of their franchise and were denied the right . . . to equal protection of the laws.” Id.

In a more extreme case, in League of Women Voters of Ohio v. Brunner, 548 F.3d 463, 477–78 (6th Cir. 2008), voters were forced to wait in incredibly long lines, some up to twelve hours, due to several factors. The Court found that “[l]ong wait times caused some voters to leave their polling places without voting in order to attend school, work, or to family responsibilities or because a physical disability prevented them from standing in line.” Id. at 478. The Court also found that “[p]oll workers received inadequate training, causing them to provide incorrect instructions and leading to the discounting of votes.” Id. The Court concluded that these allegations, together with others, such as malfunctioning voting machines, “could establish that Ohio’s voting system deprives its citizens of the right to vote or severely burdens the exercise of that right depending on where they live in violation of the Equal Protection Clause.” Id.

As noted above, there is official documentation of individuals leaving long lines at polling place in prior years. This will only become worse under SB3, and the impact will be felt by different populations depending on their geographic location, socioeconomic status, and educational background. Upon consideration of the foregoing, the Court finds that the burdens imposed by SB3 are unreasonable and discriminatory, triggering the intermediate level of scrutiny articulated by the New Hampshire Supreme Court in Guare. Therefore, “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.” Guare, 167 N.H. at 665.

II. Interests Articulated by the State

In their requests for findings of fact and rulings of law, the State articulates the following interests in support of SB3: (1) assessing the eligibility and qualifications of voters; (2) ensuring that only those individuals qualified to vote under Part I, Article 11 of the New Hampshire Constitution are registering and voting in the proper location; (3) safeguarding voter confidence in the election system; (4) protecting public confidence in the integrity of the State's elections; and (5) preventing and protecting against wrongful voting and/or voter fraud.

The State argues that the most reliable source of legislative intent, aside from the language of the statute, is the majority report of the committee recommending the adoption of the legislation. In this case, that report reads as follows:

This bill, as amended by the committee, is designed to strengthen the public confidence in the integrity of our elections by closing the domicile loophole. Under current New Hampshire law, to be qualified to vote individuals must establish their domicile in the town or ward where they seek to register. Many new registrants satisfy this requirement by signing a "domicile affidavit" in which they attest under penalty of perjury that they are domiciled in the town or ward. The use of only an affidavit to prove domicile creates opportunities for voter fraud because election officials must take the applicant at his or her word. Furthermore, because the standard for domicile under RSA 654:1, I, is entirely subjective . . . , it is virtually impossible to prove that an individual has misrepresented domicile in the affidavit. . . . [This bill creates] an important change in the law because it makes false representations of domicile much more difficult and makes enforcement of the law much easier if there are misrepresentations. . . . The minority argues that the law should not be changed because there is not serious voter fraud. The majority rejects this as the standard the legislature should apply when considering election law reform. If current law creates opportunities for voter fraud the majority believes that the law should be changed to eliminate those opportunities regardless of whether anyone can demonstrate that the vulnerability in the law has been exploited.

(JE 3.) Furthermore, Senator Regina Birdsell, one of the bill's sponsors, stated:

This legislation has been in the making for a long time. Some people believe there is rampant voter fraud, while others believe that voter fraud is widespread enough to bother not doing anything about it. However almost no one believes that voter fraud does not exist at all and how could they? The secretary of state testified that in every election at least one case is discovered and prosecuted. As with all other kinds of crime, it is hard to know how many undiscovered cases occur. With our incredibly lax honor system voting we let people who vote simply because they say they are domiciled here. We have no way to know how many improper votes are cast by those not truly domiciled in the state each election. Mister President, we owe it to our constituents to balance two equally important ideas. One; we want to make voting and access to the polls easy enough that not one single qualified voter is turned away and denied the right to cast a legal ballot. Two; we want to make our voting system secure enough that not one single qualified voter has his or her vote cancelled out by ballots cast by someone who is not legally domiciled here. . . . If we continue to turn a blind eye to the fact that this happens in every election without making any effort to assure that only legal voters are casting ballots in our elections, then we are not doing right by our constituents.

(JE 2 CSR 15–16.) Senator Andy Sanborn, another sponsor of the bill, stated:

I would hope that . . . if you truly believe that every eligible voter has a right to vote, that you have an equally strong requirement to make sure their vote counts. . . . Some people in this room have had exceptionally close races. So shouldn't we be trying just as hard to make sure that we know we have done all in our power to make sure that every vote was eligible, and that every vote counted? Because if one person slips in to decide a race who is not eligible, it has disenfranchised every person who showed up who was eligible. So when we talk about fraud, . . . because we don't have any protection on fraud, because we are one of the most lax states in America. . . . Additionally, while I don't think there is widespread fraud and abuse, we received testimony from the secretary of state himself . . . that said that in every single election in recent history, they have brought someone up on voter fraud. . . . [I]f we do not ensure integrity, integrity of the process, that beyond any other measure will discourage people from voting.

(*Id.* at CSR 25–26.)

From the foregoing, contrary to the State's assertions, it is abundantly clear to the Court that voter fraud and wrongful voting were at the center of SB3's creation and

passage. All remarks regarding improving confidence in and the integrity of the State's elections were made in the context of closing "loopholes" and tightening up the "lax" system that supposedly enables ineligible voters to cast ballots throughout the State. However, as documented throughout the preliminary injunction hearing and as acknowledged by the legislature, voter fraud is not widespread or even remotely commonplace. During the hearing, Dr. Herron testified that the fraud rate for the 2016 general election, for which there was a single confirmed case of voter fraud, was .0166% when looking at the number of domicile affidavits signed (6,033) and .00013% when looking at the number of total ballots cast (755,850). Dr. Herron reported similarly miniscule rates of voter fraud investigation in prior years.⁴ Dr. Lorraine Minnite testified that her research of voter fraud in New Hampshire indicated that there has been less than one case per year over the past twenty years.

Moreover, none of the confirmed cases of voter fraud appear to have been the result of a misused domicile affidavit. Further, and most importantly, SB3 itself does nothing to actually prevent voter fraud. Because neither option on Form B requires a registrant to provide proof of domicile prior to voting, anyone intent on casting an ineligible vote can readily do so. Therefore, instead of combating fraud, the law simply imposes additional burdens on legitimate voters.

Similarly, voter confidence is already very high in New Hampshire, as evidenced by the high rate of voter participation. Dr. Herron testified that New Hampshire ranks among the highest in the country for voter turnout. In fact, voter turnout in 2016 was the highest turnout in New Hampshire in eight years and New Hampshire ranked third in the

⁴ .00076% in 2006 (3 investigations out of 393,056 ballots cast), .0014% in 2008 (10 investigations out of 719,403 ballots cast), and .00087% in 2010 (4 investigations out of 461,423 ballots cast).

nation for voter participation. Notably, despite making reference to the goal of increasing voter confidence and the integrity of the election system, none of the proponents of SB3 put forth any actual evidence that the public lacks confidence in the system.

Therefore, as with voter fraud, improving confidence in New Hampshire's election system is not a significant State interest that justifies placing increased burdens on voters. Moreover, there is no evidence that SB3 even accomplishes its stated goal in this regard. The State presented no evidence that the new domicile affidavit has had any impact on the public's perception of the election process. In contrast, Dr. Herron testified that the most important factor in the perception of election integrity is referred to as the "winner effect": an individual is more likely to believe that the election process is fair when their preferred candidate wins, and vice versa.

The Court agrees with the State that its articulated justifications for the law are valid and important concerns. However, the Court finds that, at this stage, the State has failed to meet its burden of establishing that SB3 actually addresses these interests. The language of the forms was drafted by legislators and reads like a statute, but is meant to be read, understood, and followed—under threat of criminal charges and civil fines—by all eligible citizens regardless of education or disability, under the pressure of a line of dozens, if not hundreds, waiting behind them, and with the assistance of volunteers with as little as five minutes of training. As Senator Birdsell herself acknowledged on the floor of the senate, "one voter being disenfranchised because someone illegally voted is just as wrong as someone not being able to vote at the polls." (JE 2 at CSR 30). Given the extraordinarily low rate of documented voter fraud in this

state, it is far more likely that more legitimate voters will be dissuaded from voting than illegitimate voters will be prevented. Accordingly, the Court finds plaintiffs have demonstrated a likelihood of success on the merits for their claim that SB3 unconstitutionally burdens the right to vote. As the requested relief is identical for each count, the Court need not address the remainder of the claims raised in plaintiffs' complaint.

In addition, the Court finds there is an immediate danger of irreparable harm. "Courts routinely deem restrictions on fundamental voting rights irreparable injury." League of Women Voters of North Carolina v. North Carolina, 769 F.3d 224, 247 (4th Cir. 2014). "[D]iscriminatory voting procedures in particular are the kind of serious violation of the Constitution and the Voting Rights Act for which courts have granted immediate relief." Id. "[O]nce the election occurs, there can be no do-over and no redress." Id.

Furthermore, the public interest favors the issuance of a preliminary injunction. "While states have a strong interest in their ability to enforce state election law requirements, the public has a strong interest in exercising the fundamental political right to vote." Obama for Am. v. Husted, 697 F.3d 423, 436 (6th Cir. 2012). "That interest is best served by favoring enfranchisement and ensuring that qualified voters' exercise of their right to vote is successful." Id. at 437. "The public interest therefore favors permitting as many qualified voters to vote as possible." Id.

Finally, under the circumstances of this case, there is no adequate, alternative remedy at law available to plaintiffs. Where the law threatens to disenfranchise an individual's right to vote, the only viable remedy is to enjoin its enforcement.

Accordingly, for the foregoing reasons, plaintiffs' motion for preliminary injunction is GRANTED. In granting this relief, the Court is mindful of the close proximity of the midterm elections. Nevertheless, the Court is confident that the Secretary of State's office shall be able to ensure that the proper registration forms are distributed to all polling places throughout the state prior to the election. Moreover, given the time constraints, the Court's concerns that longer forms result in longer lines, and the Secretary of State's familiarity with the forms used in the 2016 general election, the State shall utilize that 2016 domicile affidavit in the upcoming election.

SO ORDERED.

10/22/18
Date


Kenneth C. Brown
Presiding Justice

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STATE OF NEW HAMPSHIRE

HILLSBOROUGH COUNTY SUPERIOR COURT NORTH

LEAGUE OF WOMEN VOTERS OF NH,)	Superior Court Case No.
et al.,)	226-2017-CV-00433
)	
Plaintiffs,)	
)	
vs.)	Manchester, New Hampshire
)	September 7, 2018
WILLIAM M. GARDNER & GORDAN)	10:29 a.m.
MACDONALD,)	
)	
Defendants.)	
)	

HEARING ON PETITION FOR PRELIMINARY INJUNCTION
BEFORE THE HONORABLE KENNETH C. BROWN
JUDGE OF THE SUPERIOR COURT

APPEARANCES:

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I N D E X

WITNESS (ES) DIRECT CROSS REDIRECT RECROSS

FOR THE PLAINTIFFS:

None

FOR THE DEFENDANTS:

Karen Freitas	5	32	58
Orville Fitch	64	129	149

MISCELLANEOUS

PAGE

Defendants Rests 154

EXHIBITS

ID

EVD

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Defendants' 5G	Document	114	114

1 from the letter of the law.

2 Q And if you need to go beyond that, would it include
3 the documents that you just described?

4 A Yes.

5 MS. EDWARDS: We're done with that exhibit.

6 BY MS. EDWARDS:

7 Q Attorney Fitch, is the Secretary of State's Office
8 training local election officials?

9 A Yes.

10 Q And have any of those trainings been focused on Senate
11 Bill 3?

12 A Yes.

13 Q Can you estimate how many trainings have had a focus
14 on Senate Bill 3?

15 A Well, trainings that were held pretty much exclusively
16 for the purpose of training Senate Bill 3 are about 13 that
17 trained about -- I had about 600, maybe 598 or -9 attendees.
18 But during the same period of time, there were trainings that
19 included Senate Bill 3 but were -- also covered other kinds of
20 issues. For example, the annual meeting of the town city
21 clerks in October. Presentations were done on a number of
22 different issues including Senate Bill 3. Regional clerks
23 meetings or other places that we go and present information on
24 multiple topics, pretty much since its implementation, Senate
25 Bill 3 has most often been a topic that's covered.

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The logo for eScribers, featuring the word "eScribers" in a stylized font where the "e" is lowercase and the "Scribers" is uppercase, all within a dark rectangular background.

1 Q Why does the Secretary of State's Office do these
2 types of trainings?

3 A The Secretary of State has a responsibility under the
4 statute, working with the Attorney General, to issue the
5 election procedure manual, which is a written guidance, and
6 oftentimes the foundation of what is trained, but also to --
7 in the Secretary of State is, by statute, the chief election
8 officer for the state. And we are generally understood to
9 have a responsibility to provide training and guidance to the
10 people that actually carry out elections, which are the
11 locally elected moderators, clerks, and supervisors.

12 Q And are these trainings a new thing for the Secretary
13 of State's Office?

14 A No. I have heard stories that -- going back almost
15 for the full 40 years of the Secretary's service, of the
16 trainings that were done at different moments. I think there
17 have been periods of time when they're more active
18 historically. I can remember some -- Tom Laff (phonetic),
19 Bill Gardner traveling around the state, stories going back
20 that far. When the Help America Vote Act was adopted, the
21 federal act of 2002, so really 2003 on, we were advancing it.
22 There was a significant uptick, in part, because there was a
23 lot of complicated federal law to implement and, in part,
24 because congress gave us back a fair bit of our money for the
25 state to use for purposes like this training. So we -- I

1 think that year we did 20 trainings around the state that may
2 have been three hours or so in duration.

3 Q Of the trainings that we were talking about in the
4 beginning of this series of questions regarding Senate Bill 3
5 and the broader trainings that you've just been discussing
6 that occurred in the last year, approximately how many of
7 those trainings, either by number or percentage-wise, have you
8 attended?

9 A I think I have attended 100 percent of them, if not,
10 pretty close.

11 Q During these trainings, did local election officials
12 have the opportunity to ask questions?

13 A Yes.

14 Q Did they ask questions?

15 A Yes.

16 Q Were answers provided to their questions?

17 A Yes.

18 Q If a local election official isn't able to come to one
19 of the trainings that the Secretary of State's Office puts on,
20 do they have any other opportunities to obtain guidance from
21 the Secretary of State's Office?

22 A Yes. The Secretary of State's Office publishes -- we
23 just updated and published the newest version of the election
24 procedure manual. And that is sent to every election
25 official, selectman, moderator, supervisors of the checklist

1 and clerk in the state. It's mailed to them. And in the
2 cities, we -- to the best we can get, the home addresses for
3 the different city officials. We send it to them. If not, we
4 send it to the city officials to distribute to their local
5 election officials. That document is posted on the Secretary
6 of State's website.

7 The Secretary of State names a state-wide voter
8 registration system, it's called Election Net. Election Net
9 has a section that is called help, and then instructions, and
10 it is a accumulation of both forms and guidance documents. It
11 is something that clerks and supervisors of the checklist have
12 logins to and access to. We also post all manner of things
13 there.

14 It has also been the common practice of the
15 Secretary of State's office to collaborate with the Attorney
16 General in issuing pre-election memos to all those officials.
17 And leading up to elections, we issue -- well, we issued
18 something quite recently from the other court case that we
19 just had. And those memos are also distributed, and they're
20 posted where people or the elected officials can get them
21 through Election Net.

22 Q Does the HABBA desk offer help to individual clerks if
23 they call in or supervisors?

24 A The HABBA desk provides both answers to questions if
25 they call in or email in. We have a number of staffers who

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1 where folks are registered on election day.

2 Q Attorney Fitch, is information included in the
3 election procedures manual regarding how supervisors can
4 register college students to vote?

5 A Yes. I -- I believe we do have some college student
6 sections. I'm not going to remember the page number.

7 Q That's okay. There's information in there about that?

8 A Yes.

9 Q And those are the document -- the elections procedure
10 manual is a document that it's given to election officials to
11 use as a guide?

12 A Yes. It is sent out to everybody in physical form and
13 electronic copies are made for them. They're encouraged to
14 bring the physical -- the paper document with them to the
15 polls for reference and their encouraged to have the
16 electronic copy on their computers and taught how they can do
17 an electronic search to quickly find the pertinent sections.

18 Q Is the election procedures manual meant to be read
19 cover to cover by every election official?

20 A No. It is organized from start to finish. We added
21 this year a new chapter at the beginning that says what is
22 new, so that people have been reading it. Some people have
23 been serving for 30 and 40 years in these positions. They're
24 saying I've kind of read it before and they said can't you
25 tell us what's new? So we have done that. So we try to

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STATE OF NEW HAMPSHIRE

HILLSBOROUGH COUNTY SUPERIOR COURT NORTH

LEAGUE OF WOMEN VOTERS OF NH,) Superior Court Case No.
et al.,) 226-2017-CV-00433
)
Plaintiffs,)
)
vs.) Manchester, New Hampshire
) September 6, 2018
WILLIAM M. GARDNER & GORDAN) 8:35 a.m.
MACDONALD,)
)
Defendants.)

HEARING ON PETITION FOR PRELIMINARY INJUNCTION
BEFORE THE HONORABLE KENNETH C. BROWN
JUDGE OF THE SUPERIOR COURT

APPEARANCES:

For the Plaintiffs:	William E. Christie, Esq. S. Amy Spencer, Esq. SHAHEEN & GORDON, P.A. P.O. Box 2703 107 Storrs Street Concord, NH 03301 - and - Bruce V. Spiva, Esq. Amanda R. Calais, Esq. John Devaney PERKINS COIE 700 13th Street, NW Suite 600 Washington, DC 20005-3960 - and - Henry R. Klementowicz, Esq. Steven J. Dutton MCLANE MIDDLETON 900 Elm Street 10th Floor Manchester, NH 03101
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I N D E X

<u>WITNESS (ES)</u>	<u>DIRECT</u>	<u>CROSS</u>	<u>REDIRECT</u>	<u>RE CROSS</u>
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FOR THE PLAINTIFFS:

Richard Tracy		6	37	48
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Ann Shump		49	54	56
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David Scanlan	57	159		
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FOR THE DEFENDANTS:

NONE

MISCELLANEOUSPAGE

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Plaintiffs' 62A - 62M	Website Printouts	157
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Plaintiffs' 63A - 63B	Website Printouts	157
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1 approximately are there in New Hampshire? Is it over 3,000?

2 A There certainly -- it certainly is between 2,000 and
3 2500.

4 Q Okay.

5 A And those are just for town elections. That's not
6 including school district election officials, or rules,
7 district election officials.

8 Q When you include those, it's well over 3,000, isn't
9 it?

10 A Oh, well over 3,000, yes.

11 Q How many have received training on SB3?

12 A We're having our 17th and final training session
13 today, leading up to the primary. They're aware discussing
14 Senate Bill 3 is a part of that. I would say our average
15 attendance of those is just on the short side of 100 per
16 session. So I would be comfortable saying that 1500-plus
17 local election officials have attended the training.

18 Q These are some people that have attended more than one
19 training; is that right?

20 A Some people have attended more than one.

21 Q And so that -- then you might have some double
22 counting in there; is that fair?

23 A I would still say well over 1500 have attended the
24 training sessions, separate individuals.

25 Q So over half of the election officials in New

1 place on the day of election.

2 MS. EDWARDS: And, Your Honor, I'm going to be in
3 Defendants' volume 4, or looking at Exhibit 5G.

4 MR. SPIVA: Volume 5, Your Honor.

5 MS. EDWARDS: I'm sorry, Your Honor, it's volume 4.
6 Want to borrow mine?

7 THE COURT: I may. Volume 4.

8 MS. EDWARDS: It's Exhibit 5G.

9 BY MS. EDWARDS:

10 Q Is that the election procedure's manual we were just
11 talking about?

12 A Yes, this is the most recent version of the election
13 procedure manual.

14 Q Do you know how many election procedure manuals the
15 Secretary of State's Office has published?

16 A I think --

17 THE COURT: Meaning sequentially or at one time?

18 MS. EDWARDS: Sequentially, Your Honor. Thank you.

19 THE WITNESS: They go back to at least about 2000,
20 2002.

21 BY MS. EDWARDS:

22 Q And how often are they printed?

23 A Every two years prior to each round of state
24 elections.

25 Q And who are the election procedure manuals provided

THE STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS
NORTHERN DISTRICT

SUPERIOR COURT

226-2017-CV-00432

NEW HAMPSHIRE DEMOCRATIC PARTY,
BY RAYMOND BUCKLEY, CHAIR

v.

WILLIAM M. GARDNER,
IN HIS OFFICIAL CAPACITY AS THE NEW HAMPSHIRE SECRETARY OF STATE; AND
GORDON MACDONALD,
IN HIS OFFICIAL CAPACITY AS THE NEW HAMPSHIRE ATTORNEY GENERAL

and

226-2017-CV-00433

LEAGUE OF WOMEN VOTERS OF NEW HAMPSHIRE
DOUGLAS MARINO
GARRETT MUSCATEL,
ADRIANA LOPERA,
PHILLIP DRAGONE,
SPENCER ANDERSON, and
SEYSHA MEHTA

v.

WILLIAM M. GARDNER,
IN HIS OFFICIAL CAPACITY AS THE NEW HAMPSHIRE SECRETARY OF STATE; AND
GORDON MACDONALD,
IN HIS OFFICIAL CAPACITY AS THE NEW HAMPSHIRE ATTORNEY GENERAL

**EXPEDITED MOTION FOR CLARIFICATION AND EMERGENCY STATUS
CONFERENCE OR, ALTERNATIVELY, FOR A STAY OF THE COURT'S OCTOBER
22, 2018 ORDER**

The Defendants, by and through counsel, the Office of the Attorney General, respectfully
request an emergency status conference to be scheduled today, or as soon as practicable, or, in

the alternative, a stay of the Court's October 22, 2018 Order enjoining Senate Bill ("SB 3"). In support thereof, Defendants state as follows:

1. The State General Election is set to occur on November 6, 2018.
2. The Supervisors of the Checklists in all towns and cities will be holding their final session for the correction of the election-day checklist within the next week. *See* RSA 654:27 ("In cities and towns, the supervisors of the checklist shall be in session...6 to 13 days prior to the election and upon which all hearings shall be finally closed.") Therefore, voters seeking to register before Election Day must do so at some point between today, October 24, 2018, and October 31, 2018, depending on when each town or city schedules its final supervisor session.
3. Since this Court issued its October 22, 2018 Order granting Plaintiff's Motion for a Preliminary Injunction, both the Department of State and the Attorney General's office have fielded inquiries from local election officials regarding voter registration.
4. Defendants respectfully request an emergency status conference to address the following issues that require clarification in order to ensure the orderly administration of the State General Election.
 - a. Is the Court's injunction limited to requiring the defendants to use the 2016 state general election day registration on November 6, 2018 to register persons to vote?
 - b. If not, what voter registration process should be used to register persons to vote before November 6, 2018 election? By way of background, the law in effect in 2016 provided different forms that were executed by voters registering on Election Day than those seeking to register beforehand. Election Day registrants utilized the 2016 General Election Day Registration form while voters wishing to register before or after Election Day were required to complete a voter registration

form and a stand-alone Domicile Affidavit if he or she did not bring proof of domicile.

- c. What voter registration process and forms should be used to register persons to vote after the November 6, 2018 election?
- d. Has the court enjoined enforcement of every statutory provision contained in SB 3 in advance of the November 6, 2018 election?
- e. Has the temporary restraining order entered earlier in this case been dissolved? If not, do the Defendants still have an affirmative obligation to inform voters that certain penalty provisions associated with Senate Bill 3 have been enjoined? If not, do the Defendants still have an affirmative obligation to try to get localities to update their local webpages to conform to the court's order in advance of the November 6, 2018 election?
- f. RSA 658:29 requires the Secretary of State to "prepare and distribute copies of the following RSA sections which the selectmen shall post outside the guardrail in the polling place at all elections." Listed statutes include RSA 654:7-a, RSA 654:7-b, RSA 659:30, and RSA 659:34, all of which were amended by Senate Bill 3. These documents have already been printed and delivered to over 300 polling locations with instructions to post them on Election Day. Are election officials enjoined from posting these documents on Election Day?
- g. RSA 654:1, I, which has not been enjoined, states in relevant part that an "[i]nhabitant's domicile for voting purposes is that place where a person, more than any other place, has established a physical presence and manifests an intent to maintain a single continuous presence[.]" (Emphasis added). Section 205:1 in

SB 3 amended RSA 654:2 by describing a non-exhaustive list of documents that were acceptable proof to “demonstrate [such] intent.” *See* RSA 654:2, II (d). This provision codified into law many documents that, prior to the adoption of SB 3, the State has advised local election officials were acceptable forms of proof of domicile. Local election officials have undergone extensive training by the Secretary of State on these forms of proof since the passage of SB 3. Does the injunction require the defendants to advise local election officials that they cannot rely on that training and the list of acceptable forms of proof of domicile when registering persons to vote?

- h. Section 205:2 of Senate Bill 3 adopted a change to the Voter Registration Form to align New Hampshire’s registration form with other States’ registration forms that are subject to the National Voter Registration Act. Both the 2016 form and the 2018 form requested registrants to provide the “Place last registered to vote,” however the Senate Bill 3 form contained additional language:

“I am not currently registered to vote elsewhere (initial here _____), or I request that my name be removed as a registered voter in _____ (fill in your address where previously registered, street, city/town, state, and zip code)”

Is the State enjoined from incorporating the above language into its voter registration forms?

5. Alternatively, if the superior court cannot provide the defendants with clarity and guidance on these important issues on an expedited by October 26, 2018, the defendants would respectfully request that this Court stay its October 22, 2018 Order until after the November 6,

2018 state general election.¹ *Purcell v. Gonzalez*, 549 U.S. 1, 4-5 (2006) (“[c]ourt orders affecting elections . . . can themselves result in voter confusion and consequent incentive to remain away from the polls. As an election draws closer, that risk will increase.”); *Colon-Marrero v. Conty-Perez*, 703 F.3d 134, 139-40 & n. 9 (1st Cir. 2012) (“We are not alone in holding that even where plaintiff has demonstrated a likelihood of success, issuing an injunction on the eve of an election is an extraordinary remedy with risks of its own.”).

6. The defendants have requested the plaintiffs’ assent to the relief requested in this motion. At this time, the plaintiffs have not conveyed their position to the defendants.

WHEREFORE, the State of New Hampshire respectfully requests that this Honorable Court:

(A) Grant Defendants’ Expedited Motion for Clarification and issue an Order addressing the above issues by October 26, 2018 or, alternatively, stay the court’s October 22, 2018 Order;

(B) Schedule a Status Conference for today, or as soon as practicable, to address the above listed issues; and

(C) Grant such further relief as may be deemed just and proper.

¹ The defendants have simultaneously filed an Emergency Motion to Stay in the New Hampshire Supreme Court in the event this court cannot address the questions presented in this motion on an expedited basis.

Respectfully submitted,

WILLIAM M. GARDNER,
SECRETARY OF STATE and

GORDON MACDONALD,
ATTORNEY GENERAL

By their attorneys,

GORDON J. MACDONALD
ATTORNEY GENERAL



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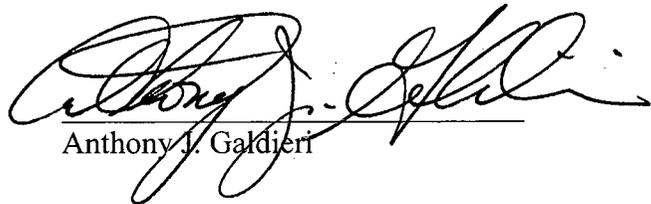
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October 24, 2018

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was transmitted by electronic mail and/or First Class mail, postage prepaid, to all counsel of record.

October 24, 2018



Anthony J. Galdieri