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 Envtl. 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 apparoached 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 participants[2] 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. Herron[3] 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.

10/24/18
Date

K. C. Brown
Kenneth C. Brown
Presiding Justice