STATE OF NEW HAMPSHIRE
SUPREME COURT

2018 TERM
No. 2018-0208

PETITION OF THE NEW HAMPSHIRE SECRETARY OF STATE
AND NEW HAMPSHIRE ATTORNEY GENERAL

OBJECTION TO THE STATE'S EMERGENCY MOTION TO STAY PURSUANT TO NEW HAMPSHIRE SUPREME COURT RULE 7-A

In response to the Court's October 25, 2018 Order, Plaintiffs-Appellees, League of Women Voters of New Hampshire ("LWVNH"), Douglas Marino, Garrett Muscatel, Adriana Lopera, Phillip Dragone, Spencer Anderson, and Seysha Mehta, and the New Hampshire Democratic Party ("NHDP") (collectively, "Plaintiffs"), hereby submit this Objection to the Emergency Motion to Stay Pursuant to New Hampshire Supreme Court Rule 7-A filed by the Defendants-Appellants William Gardner, New Hampshire Secretary of State, and Gordon MacDonald, New Hampshire Attorney General (collectively, "Defendants"). In support of this Objection, Plaintiffs state as follows:

1. On October 24, 2018, simultaneous with their filing of a Motion for Clarification and Emergency Status Conference Or, Alternatively, for a Stay of the Court's October 22, 2018 Order ("Superior Court Motion") in the Superior Court, Defendants filed in this Court a motion for emergency stay of the October 22, 2018 Order of the Superior Court (Brown, J.) ("the Motion"). Defendants claim to need extraordinary relief from this Court due to purported confusion resulting from the Superior Court's October 22, 2018 Order enjoining SB 3—a law which made sweeping changes to New Hampshire's voter registration process by altering the requirements for proving domicile. The Superior Court found SB3 to be unconstitutionally burdensome and discriminatory.

See generally Ex. A (Oct. 22, 2018 Order). Defendants represented in the Motion that they "either need[ed] the superior court's order to be stayed or need[ed] to obtain substantial clarification on the effects of the order quickly." Mot. to Stay ¶ 23.

2. The Superior Court promptly responded, scheduling a hearing for October 25, 2018, the day after Defendants filed the Superior Court Motion. The Superior Court has now provided Defendants with precisely the relief they requested. During the one-hour hearing, the Court walked question-by-question through the requests for clarification raised by Defendants and provided clarification on each and every point raised by Defendants in their Superior Court Motion as well as any alleged confusion they raised orally at the hearing. The Court also modified its initial preliminary injunction order so that it would not take effect until election day, thereby eliminating the concerns Defendants had raised about confusion surrounding the limited amount of voter registration that remains between now and election day. In the Superior Court's resultant order, issued that same day, the Court explained that "[d]uring the course of the hearing, the parties acted in good faith to resolve all matters of confusion raised by the State in its motion." Oct. 25, 2018 Order at 2. The Superior Court expressed its confidence that "the State will be able to draw upon its extensive experience in running elections in prior years to ensure a smooth process[.]" *Id.* Because it had addressed all issues of confusion expressed by Defendants in their Superior Court Motion as well as all additional questions raised by Defendants during the course of the hearing, granting Defendants all of the relief they requested, the Superior Court orally denied Defendants' request for a stay. *See* Mot. to Stay ¶ 23 (explaining that Defendants' needed either substantial clarification *or* the Superior Court's Order stayed); *see also* Ex. G (Plaintiffs' Obj. to Defs.' Motion) (discussing solutions to purported confusions and objecting to stay).

3. At the end of the Superior Court hearing, rather than respond by agreeing to implement the Superior Court's October 25, 2018 order and provide immediate guidance to the local election officials, Defendants tellingly changed course entirely from the position they took in their Superior Court Motion, orally asking for a stay of the Court's October 22 Order on the grounds that its implementation was "confusing." They took this

position despite the Court having addressed every single concern they raised prior to or during the hearing. When prompted repeatedly by the Superior Court, Defendants could not articulate even a single remaining area of confusion. The Court stated: "I see no reason to stay the prior order because I think we've addressed every single concern regarding confusion the State could muster"

4. The Superior Court explained that any remaining concerns about alleged confusion could not outweigh the clear record of confusion and lines that would ensue if SB 3 were to remain in effect for the November 6, 2018 mid-term Election Day—a conclusion the Superior Court reached after a nine day evidentiary hearing involving evidence from four experts and testimony from over twenty lay witnesses, including multiple local election officials. *See also* Oct. 25, 2018 Order at 2 ("Based on the information received over the course of a nine-day preliminary injunction hearing, the Court believes that to do anything more at this point in time would only serve to bring about the concerns that the Court's injunction was intended to prevent.").

5. Defendants' complete change in direction after the Superior Court provided them the very relief they had sought—clarification on how to implement the court's order and modifications to eliminate any perceived implementation concerns—exposes its Motion for what it really is: a thinly-veiled attempt to create a record of difficulty and confusion where there really is none in order to allow the State to further delay implementation of the preliminary injunction. Indeed, despite the fact that the Superior Court answered every "concern they could muster," including the questions articulated in their Superior Court Motion, Defendants continue to seek a stay of the Superior Court's October 22, 2018 Order enjoining SB 3. Their request for a stay, essentially a request for an injunction pending appeal, fails to present the type of emergency situation that would remotely warrant the grant of such extraordinary relief.

6. More importantly, as the Superior Court explained, granting a stay would allow an "unreasonable and discriminatory" law that "threatens to disenfranchise an individual's right to vote," to be implemented in New Hampshire, thus infringing upon New Hampshire citizens' right to vote and ensuring their unequal treatment in violation

of the New Hampshire Constitution. Ex. A at 17, 22. This Court should not ignore the careful findings and conclusions of the Superior Court that led it to conclude that allowing SB3 to remain in effect on Election Day threatens to undermine the right to vote of New Hampshire citizens.

The Superior Court's Injunction of SB 3 Does Not Warrant Extraordinary Relief

7. Defendants request for a stay is primarily based on the grounds that the close proximity between the issuance of the injunction and Election Day breeds confusion, creating an emergency that requires this Court's intervention. That is not so. The Superior Court's October 25, 2018 Order made it clear that its injunction of SB 3 takes effect on November 6, 2018, and simply requires the State to revert to the 2016 Election Day forms—a registration form and affidavit which the local election officials are familiar with administering, and which they have testified is far easier to administer than SB 3.[1] *See, e.g.*, Ex. B (8/30 Tr. at 124:14-18, 128:16-131:5, 134:6-20, 140:14-141:3, 147:7-16, 152:10-21 (Shump); 9/5 Tr. at 150:12-23, 156:2-12 (Corell); 9/5 Tr. at 202:18-203:4 (Wilke)). Further, at the October 25, 2018 hearing, the State represented that it is easy for them to create and distribute the new registration forms. Moreover, those voters registering between now and Election Day will register under the SB 3 regime, as modified by the TRO entered on September 12, 2017, ensuring uniformity and eliminating any conceivable confusion or perceived hardship due to the timing of the Superior Court's decision.[2] Oct. 25, 2018 Order at 1. And given that the Superior Court

[1] At the hearing, the State requested that, rather than simply reverting to the 2016 registration form, a hybrid form be used, which incorporates a change made to the front page of the voter registration form under SB 3, and utilizes the back page of the 2016 form. Bud Fitch, the in-house election law attorney for the state represented to the Court that it would be easy to create this form and distribute it to the local election officials. As such, neither Plaintiffs nor the Court objected to the use of this form, nor can Defendants now claim that it is problematic to switch to it.

[2] Per RSA 654:27-28, the last day for pre-Election Day registration is between either the 13th or the 6th day before the election (town's choice) at the Supervisors of the Checklist meeting. As such, many localities in New Hampshire have already stopped registering

addressed all of Defendants' other concerns, Defendants cannot (and indeed did not when repeatedly asked to do so by the Superior Court) articulate any actual confusion resulting from the injunction of SB 3.

8. Thus, if there is an emergency developing, and there plainly is not given the ease of implementation, it is only of Defendants' own making. The Defendants have refused to take any steps to comply with the Superior Court's injunction prior to the October 25 hearing, and they have told local election officials to continue with the forms required by SB3 Likewise, they have refused to inform these Officials that on Election Day they are required under the Superior Court's order to use the 2016 form, as modified by the Superior Court at the State's request. These actions all result from the State's bet that it will get a reversal or stay from this Court. Ex. C (Oct. 24, 2018 Memorandum to New Hampshire Election Officials); Ex. D (Tweet of Ethan DeWitt). Indeed, despite receiving all of the relief they initially requested from the Superior Court, Defendants continue to refuse to enforce the Court's order or to provide guidance to the local election officials. Ex. E (Oct. 25, 2018 Memorandum to New Hampshire Election Officials); Ex. F (Tweet of Casey McDermott). This is of a piece with Defendants' strategy in this litigation, which was filed in August 2017. Defendants have made no contingency plans whatsoever in the event that they did not prevail, and even after being ordered to change, have refused to take any steps to implement the order on the assumption this Court will reverse.

9. The Defendants may not sit on their hands and wait for, indeed create, an emergency, because they disagree with the Superior Court's injunction. Nor may they manufacture confusion, as they appear to be doing, by delaying the implementation of the injunction and the issuance of guidance to local election officials. *See, e.g.*, *Campaign for S. Equal. v. Bryant*, 64 F. Supp. 3d 906, 953 (S.D. Miss. Nov. 25, 2014) (rejecting argument that the state will be irreparably harmed absent a stay because allegations of

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voters prior to Election Day and for those localities the inquiry raised by the State is a non-issue as only Election Day registration matters at this point.

"confusion and practical difficulties" of implementing the injunctive relief were "speculative"); *S. Freedman & Co. v. Raab*, No. 06-3723 (RBK), 2008 WL 4534069 (D.N.J. Oct. 6, 2008) (denying motion to stay because the "contingencies are too speculative on which to base the extraordinary remedy of granting a stay"). This type of behavior would not warrant relief in the normal course, and it certainly cannot warrant relief here, where extraordinary relief is sought.[3] *See, e.g.*, *United States v. Texas*, 523 F.Supp. 703, 729 (E.D. Tex. 1981) (a motion to stay an order of equitable relief pending appeal "interrupts the ordinary process of judicial review and postpones relief for the prevailing party at trial, the stay of an equitable order is an *extraordinary device* which should be sparingly granted.") (emphasis added).

[3] Although the New Hampshire Supreme Court has not yet articulated a test for a stay pending appeal, which is what Defendants are seeking, federal law is instructive and sets forth a high burden to obtain such extraordinary relief. Before federal courts will stay an injunction pending appeal, the moving party must establish: 1) that it is substantially likely to prevail on the merits of the appeal; 2) that it will suffer irreparable injury if the stay is denied; 3) that other parties to the action would not be substantially harmed by the stay; and 4) that the stay would be in the public interest. *See, e.g.*, *Sierra Club v. Wagner*, 2008 WL 3823700 at *1 (D.N.H. 2008), *United States v. Private Sanitation Indus. Ass'n*, 44 F.3d 1082, 1084 (2nd Cir. 1994); *United States v. Texas*, 523 F.Supp. at 729; *Decker v. United States Dept. of Labor*, 485 F.Supp. 837, 844 (E.D. Wisc. 1980). Here, the Defendants can demonstrate none of these factors. In particular, given that Defendants have already received all the relief they requested from the Superior Court and cannot articulate any actual confusion resulting from the injunction of SB 3, they cannot make a case for irreparable harm. *See, e.g.*, *Campaign for S. Equal.*, 64 F. Supp. 3d at 953 (rejecting argument that the state will be irreparably harmed absent a stay because allegations of "confusion and practical difficulties" of implementing the injunctive relief were "speculative"). Moreover, the record at the Superior Court demonstrates that Plaintiffs as well as thousands of New Hampshire voters will be substantially harmed as their vote or the votes of their constituents will be infringed upon by SB 3. This latter point also demonstrates that a stay, which will likely result in the disenfranchisement of prospective New Hampshire voters, is plainly not in the public interest. *Obama for Am. v. Husted*, 697 F.3d 423, 436 (6th Cir. 2012) ("Public interest therefore favors permitting as many qualified voters to vote as possible.") Finally, for all of the reasons stated in the Superior Court's October 22 Order, Defendants are not likely to succeed on the merits. *Tiberghein*, 151 N.H. at 394 (court assumes evidence supports superior court determination).

10. In fact, absent the existence of an emergency, what the State is essentially seeking here is an immediate appeal and reversal of the Superior Court's decision on the merits—without the benefit of the trial transcript, exhibits, or the record in the nine-day preliminary injunction hearing. But this Court has been clear that the standard for overturning an injunction in the normal course is also high, and it will uphold an injunction on appeal unless the superior court committed an error of law, abuse of discretion, or clearly erroneous findings of fact. *Thompson v. N.H. Bd. Of Med.*, 143 N.H. 107, 109 (1998); *Concord Orthopaedics Prof'l Ass'n v. Forbes*, 142 N.H. 440, 446 (1997); *see also Gauthier v. Robinson*, 122 N.H. 365, 368 (1982) ("[t]he granting of an injunction ... is a matter within the sound discretion of the Court exercised upon a consideration of all the circumstances of each case and controlled by established principles of equity."). It is within the superior court's sound discretion to grant an injunction after consideration of the facts and established principles of equity. *N.H. Dept. of Environmental Servs. v. Mottolo*, 155 N.H. 57, 63 (2007); *Thompson*, 143 N.H. at 109. And, indeed, without a sufficient record of the proceedings below, this Court assumes that the evidence supports the result reached by the superior court[.]" *Tiberghein v. B.R. Jones Roofing Co.*, 151 N.H. 391, 394 (2004).

11. As explained, all of the issues of alleged "confusion" raised in Defendants' Motion to this Court on Wednesday were addressed by the Superior Court's October 25th Order in which the Superior Court addressed each of those issues. Thus, in support of their Motion in this Court, Defendants come not with the laundry list of purported items of confusion that they put in their Motion here and at the Superior Court, but instead are left with the threadbare assertion of generalized confusion asserted at the end of yesterday's hearing. Even absent the need for some showing of extraordinary circumstances, this remaining bald assertion of "confusion" provided by Defendants in support of their request to stay the Superior Court's injunction is insufficient.[4] Moreover,

[4] In addition to their claims about confusion, the Defendants also emphasizes the effort that they have undertaken to train local election officials about SB 3, noting that trainings have been "thorough." As noted above, however, the record actually shows that these trainings

it is telling that Defendants cite not one iota of evidence that they put on at the preliminary injunction hearing, or that they raised in front of the Superior Court before it issued its October 22 order, suggesting that it would be infeasible to return to pre-SB 3 registration forms prior to the upcoming mid-terms. That is because they did not raise this issue or put on any such evidence at trial (which they were entitled to do), and Defendants' Superior Court Motion and their Motion here are a last-ditch effort to derail the Court's injunction and retain the unconstitutional registration forms required by SB 3 for the upcoming state-wide midterms. Likewise, to the extent that Defendants do discuss things such as trainings and the implementation of SB 3 in 2017 in their Motion, the assertions that they make here are in direct contrast to the evidence at trial and, in some cases, the factual findings of the Court. *Compare* Mot. to Stay at 16 (justifying stay based on the fact that SB 3 has been in place for a year), *with* Oct. 22, 2018 Order at 15-16 (discussing differences in 2017 elections and upcoming election); *Compare* Mot. at 15-16 (discussing thoroughness of training), *with* Ex. B (8/29 Tr. 248:21-251:3, 251:4-253:10 (Spencer); 8/30 Tr. 15:10-16:14 (Spencer); 8/30 Tr. 121:8-23, 128:15-129:19 (Shump); 9/5 Tr. 189:23-191:10, 193:23-194:8, 196:20-197:14, 198:11-199:10, 200:17-201:9, 202:2-203:4, 203:6-9 (Wilke); 9/5 Tr. 152:7-153:14 (Corell); 9/6 Tr. 49:10-51:5 (Shump); 9/7 Tr. 53:3-19 (Freitas) (State's witness) (noting that despite trainings, election officials remain confused about SB 3)); *Compare* Mot. to Stay at 16 (need for training on 2016 forms), *with* Ex. B (8/30 Tr. at 124:14-18, 128:16-131:5, 134:6-20, 140:14-141:3, 147:7-16, 152:10-21 (Shump); 9/5 Tr. at 150:12-23, 156:2-12 (Corell); 9/5 Tr. at 202:18-203:4 (Wilke)) (ease of 2016 forms).

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have been ineffective in preparing even very experienced local election officials, let alone the many volunteer poll workers who will get as little as 5 minutes of training on Election Day, to understand and implement the extraordinarily dense and confusing SB3 forms, and that an injunction is necessary to avert the train-wreck that SB3 portends. Ex. B (8/29 Tr. 248:21-251:3, 251:4-253:10 (Spencer); 8/30 Tr. 15:10-16:14 (Spencer); 8/30 Tr. 121:8-23, 128:15-129:19 (Shump); 9/5 Tr. 189:23-191:10, 193:23-194:8, 196:20-197:14, 198:11-199:10, 200:17-201:9, 202:2-203:4, 203:6-9 (Wilke); 9/5 Tr. 152:7-153:14 (Corell); 9/6 Tr. 49:10-51:5 (Shump); 9/7 Tr. 53:3-19 (Freitas) (State's witness) (noting that despite trainings, election officials remain confused about SB 3)); *see also* Ex. A at 13, 21.

12. In contrast, in a careful and thorough opinion, the Superior Court articulated the unreasonable and discriminatory burdens SB3 will put on voters and explained that the State's articulated interests could not justify those burdens. Ex. A at 7-22. The Superior Court, relying on expert and witness testimony, explained that SB 3'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." *Id.* at 7. Likewise, he opined that given that complexity, the average wait time for voters registering on Election Day was likely to increase, resulting in delays and long lines. *Id.* at 10. He also detailed the unequal or discriminatory impact of the law, as it would affect young, mobile, homeless voters, and individuals voting in larger polling locations more heavily than others. *Id.* at 14-17. The Superior Court concluded that "[w]here the law threatens to disenfranchise an individual's right to vote, the only viable remedy is to enjoin its enforcement." *Id.* at 22. A sentiment which he reiterated in his October 25 Order as well. Oct. 25, 2018 Order at 2 ("Based on the information received over the course of a nine-day preliminary injunction hearing, the Court believes that to do anything more at this point in time would only serve to bring about the concerns that the Court's injunction was intended to prevent.").

13. To stay the ultimate decision and careful findings of the Superior Court highlighted above in light of the paucity of evidence of any problems with the implementation of the Superior Court's Order would fly in the face of this Court's regular evaluation of injunctions and the deference it typically provides to superior courts. Moreover, it would result in the implementation of an unconstitutional law that, after a nine-day hearing and careful consideration, the Superior Court concluded would place unreasonable and unjustified burdens on New Hampshire voters, including long lines and potential disenfranchisement. Such a result is untenable, particularly when it can be averted by the Superior Court's injunction—which Bud Fitch, a representative of the state, not its counsel in this litigation, admitted to the Superior Court just yesterday. This Court should not stay the October 22, 2018 Order.

14. Finally, in addition to the many substantive reasons warranting a denial of Defendants' Motion, the Motion is also procedurally improper because Defendants filed

it in this Court under the docket for Petition of New Hampshire Secretary of State, Case No. 2018-0208, a Rule 11 petition that this Court granted on one issue only—whether the Superior Court correctly granted Plaintiffs' motion to compel production of the New Hampshire voter file. May 23, 2018 Order Denying Mot. for Summ. Affirmance. Defendants state that "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." Mot. to Stay at 2 n.3.

15. Defendants cannot just graft an additional issue onto the limited grant of original jurisdiction that this Court made with respect to the voter file. While Defendants treat this as a minor housekeeping matter, it is not. Rule 11 requires them to file a separate Rule 11 petition and show that "there are special and important reasons," N.H. Sup. Ct. R. 11(1), for this Court to exercise original jurisdiction over the issue they raise. Defendants do not even cite this standard, let alone prove that it has been met.

WHEREFORE, Plaintiffs respectfully request that this Honorable Court:

A. Deny the Defendants Emergency Motion to Stay; and

B. Award such other relief as is just and proper.

Respectfully submitted,

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

By Their Attorneys,

Dated: October 26, 2018

By: /s/ Steven J. Dutton

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I hereby certify that on October 26, 2018, the foregoing pleading was served via electronic mail to counsel of record:

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