The State of New Hampshire
Superior Court

Hillsborough-North

AMERICAN FEDERATION OF TEACHERS, ET AL.

v.

WILLIAM GARDNER, ET AL.

No. 216-2020-CV-0570

ORDER

The plaintiffs have brought this action against William Gardner in his official capacity as New Hampshire Secretary of State and Gordon MacDonald in his official capacity as New Hampshire Attorney General. The Court granted Donald J. Trump for President, Inc. and the Republican National Committee intervenor status. The plaintiffs seek to strike down or modify various laws governing the absentee voting process, arguing they violate a number of provisions of the New Hampshire Constitution. The plaintiffs now move to preliminarily enjoin the challenged statutes in advance of the general election scheduled for November 3, 2020. The defendants have moved to stay this action until after the election is complete. In addition, the defendants have moved to dismiss the complaint. The Court held a hearing on September 24, 2020, at which the parties proceeded on offers of proof. All parties have made many thoughtful and well-researched arguments. This Court has carefully considered the merits of each of those arguments and the supplemental authority submitted by the parties. Ordinarily, the Court would address the claims and defenses point by point. This Court, however,

is mindful of the impending election and the need for resolution of this litigation sufficiently in advance of November 3, 2020. Accordingly, this Order will only touch on the main points of law that inform the Court's ruling.

Factual Background

On March 13, 2020, Governor Sununu declared a state of emergency in New Hampshire due to the global pandemic caused by the novel coronavirus known as COVID-19. Governor Sununu has extended the state of emergency a number of times since then, it remains in effect to this day, and it will in all likelihood be in effect during the general election on November 3, 2020. On April 10, 2020, the Secretary of State and the Attorney General issued guidance that any voter may request an absentee ballot for the September 8, 2020 primary and the November 3, 2020 general election based on concerns about COVID-19. On April 27, 2020, the Secretary of State announced the formation of a Select Committee on 2020 Emergency Election Support, which was charged with providing advice on the use of $3.2 million in funds provided by the CARES Act. The Select Committee issued its report on June 4, 2020, making a number of recommended changes to the absentee registration and voting process including using federal funds to provide prepaid postage on mail-in ballots and allowing voters to place their ballots in drop boxes.

This summer, the New Hampshire legislature passed HB 1266, which expands the class of persons eligible to cast a vote by absentee ballot to include those who "by reason of concern for the novel coronavirus (Covid-19) disease" cannot register or vote

in person. Governor Sununu signed HB 1266 into law on July 17, 2020. See 2020 N.H. Laws 14:1.

On August 11, 2020, the American Federation of Teachers filed this action. On August 19, 2020, the Secretary of State and the Attorney General released a joint Memorandum on Election Operations during the Public Health Crisis. The memorandum permitted local election officials to provide a drop box for voters to deposit absentee ballots, on the condition that the drop boxes be staffed by a properly trained election official. On September 1, 2020, the AFT moved to amend its complaint, adding a new plaintiff, Mary Wilke, a voter from Concord, as well as a new cause of action challenging the drop box restrictions. On September 2, 2020, the plaintiffs filed their motion for preliminary injunction, which consisted of over 800 pages of materials, including a number of affidavits. In addition to objecting to the plaintiffs' motion, the defendants filed a motion to stay and motion to dismiss on September 4, 2020, and September 21, 2020, respectively. The intervenors have filed pleadings supporting the defendants' position. The defendants have also challenged portions of the plaintiffs' supporting affidavits. The Court held a hearing on September 24, 2020. All parties have since filed additional responsive pleadings and supplemental authority.

Analysis

As an initial matter, the Court notes that the plaintiffs have brought this action alleging claims under the New Hampshire Constitution only. Therefore, the Court will address the issues raised in the plaintiffs' motion for preliminary injunction under state law, making reference to federal law only for purposes of guidance.

"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. (citation omitted). "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 its objection, the defendants argue that the relief sought by the plaintiffs is not in the nature of a preliminary injunction but a mandatory injunction. In other words, rather than preserving the status quo, plaintiffs' requested relief would dramatically alter the current circumstances. A mandatory preliminary injunction is one that "requires affirmative action by the non-moving party in advance of trial" and "alters rather than preserves the status quo." Braintree Labs., Inc. v. Citigroup Global Markets, Inc., 622 F.3d 36, 40-41 (1st Cir. 2010). "The court's authority to issue a preliminary mandatory injunction is not exercised lightly, and such an injunction is rarely issued. Indeed, it is issued even more rarely than with a final mandatory injunction or an injunction that is only prohibitory. A mandatory injunction should be crafted in a manner that is least

oppressive while still protecting valuable rights." 43A C.J.S. Injunctions § 21 (June 2020 update) (footnotes omitted).

The New Hampshire Supreme Court has noted that a mandatory injunction and a petition for writ of mandamus are subject to the same standards. See Guy J. v. Comm'r, New Hampshire Dep't of Educ., 131 N.H. 742, 747 (1989). Mandamus is an extraordinary writ. In re CIGNA Healthcare, Inc., 146 N.H. 683, 687 (2001). "A writ of mandamus is used to compel a public official to perform a ministerial act that the official has refused to perform, or to vacate the result of a public official's act that was performed arbitrarily or in bad faith." Id. The Court will only issue the writ "where the petitioner has an apparent right to the requested relief and no other remedy will fully and adequately afford relief." Id.

The Court agrees with the defendants' characterization of the plaintiffs' requested relief. Rather than challenging a newly enacted law, the laws and practices in effect for the upcoming election have been, with limited exception, in place for years. The plaintiffs therefore seek to alter the current status quo. As a result, the plaintiffs' arguments will be held to the higher standard noted above. "Nevertheless, those exigencies should still be measured according to the same four-factor test, as the focus always must be on prevention of injury by a proper order, not merely on preservation of the status quo." Braintree Labs., 622 F.3d at 40-41.

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 the current absentee voting system. "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) (emphasis in original). "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. The New Hampshire constitutional framework for evaluating challenges to burdens imposed on voters is derived from the analysis developed by the United States Supreme Court in Burdick v. Takushi, 504 U.S. 428 (1992), and Anderson v. Celebrezze, 460 U.S. 780 (1982). See Guare, 167 N.H. at 663; see also Akins v. Secretary of State, 154 N.H. 67, 71-72 (2006). For this reason it is appropriate to look to federal court decisions for guidance, recognizing that this Court has a responsibility to interpret the New Hampshire Constitution independently of its federal counterpart. See State v. Ball, 124 N.H. 226, 231 (1983).

The Court notes that it has doubts as to whether the Anderson-Burdick framework as articulated in Guare is appropriate for evaluating the burdens to voting created by the COVID-19 pandemic. As the Fifth Circuit has observed:

> Of course, there will always be voters for whom, through no fault of the state, getting to the polls is "difficult" or even "impossible." But as the Court explains, that is a matter of personal hardship, not state action. For courts to intervene, a voter must show that the state has in fact precluded voters from voting—that the voter has been prohibited from voting by the State.

Texas Democratic Party v. Abbott, 961 F.3d 389, 415 (5th Cir. 2020); see also Thompson v. DeWine, No. 20-3526, 2020 WL 5742621, at *1 (6th Cir. Sept. 16, 2020); Bethea v. Deal, No. CV216-140, 2016 WL 6123241, at *2 (S.D. Ga. Oct. 19, 2016) (recognizing the conditions created by Hurricane Matthew resulted in a "natural event [that] made it difficult, but not impossible, for certain residents of the five counties to properly register to vote prior to the October 11 deadline" but "are not impediments

created by the State of Georgia that require it to provide an extension to the voter registration deadline"). "[U]nder governing Supreme Court precedent, expanding access to mail-in voting to redress personal hardship—as opposed to state action—is a policy matter for the Legislature, not the courts." Texas Democratic Party, 961 F.3d at 415 (citing O'Brien v. Skinner, 414 U.S. 524, 525-27, 529-31 (1974); McDonald v. Bd. of Election Comm'rs of Chicago, 394 U.S. 802, 809 (1969)).

The burdens the plaintiffs complain of here are not the result of state action, but rather stem from health concerns due to the pandemic. The State of New Hampshire has not created new impediments to voting. As noted above, many of the absentee voting laws the plaintiffs seek to strike down or modify have been in effect for years. See RSA 654:16 (enacted 1979); RSA 654:17 (last amended 2004); RSA 657:17 (option for delivery agents to assist jurors introduced in 2015); RSA 657:22 (5:00 p.m. cutoff since at least 1995). Rather than making it harder to vote during the pandemic, the legislature has made it easier for some people to register and vote by enacting HB 1266, which has expanded voter access to mail-in registration and voting. Cf. Crawford v. Marion Cty. Election Bd., 553 U.S. 181, 209 (2008) ("That the State accommodates some voters by permitting (not requiring) the casting of absentee or provisional ballots, is an indulgence—not a constitutional imperative that falls short of what is required.") (Scalia, J., concurring).

The plaintiffs have identified six specific areas of the absentee voter process that they seek to enjoin. The Court must still apply the Anderson-Burdick framework because there is no question that the challenged laws place some burden on some

voters that other voters do not share. See Crawford, 553 U.S. at 191 ("However slight that burden may appear . . . it must be justified by relevant and legitimate state interests sufficiently weighty to justify the limitation.") (quotation omitted) (Stevens, J., plurality opinion). Moreover, most of the courts which have addressed voter challenges since the pandemic have taken into account "how the COVID-19 pandemic presents unique challenges" to voters and the election system. Democratic Nat'l Comm. v. Bostelmann, No. 20-CV-249-WMC, 2020 WL 5627186, at *15 (W.D. Wis. Sept. 21, 2020); see, e.g., Democracy N. Carolina v. N. Carolina State Bd. of Elections, No. 1:20CV457, 2020 WL 4484063, at *25 (M.D.N.C. Aug. 4, 2020) (citing cases). This Court need not recount the seriousness of the current crisis. The impact of the pandemic on virtually every New Hampshire resident cannot be gainsaid. The Court has considered the plaintiffs' challenges under the Anderson-Burdick framework based on the circumstances and prevailing conditions created by COVID-19. See New Georgia Project v. Raffensperger, No. 1:20-CV-01986-ELR, 2020 WL 5200930, at *10 (N.D. Ga. Aug. 31, 2020) ("In this case, Plaintiffs contest the constitutionality of the Challenged Policies as they are applied during the November 2020 election cycle in light of the COVID-19 pandemic."), appeal filed (11th Cir. Sept. 4, 2020). Thus, the Court will address each of the plaintiffs' challenges, in turn.

I. Online Availability of Forms

The plaintiffs first argue that absentee voter registration forms ought to be made available for download on the Secretary of State's website. According to the plaintiffs, New Hampshire is the only state in the country that does not provide this capability for

voters. See Expert Affidavit of Michael C. Herron at ¶ 50. The defendants object on several grounds. First, the defendants argue that making the forms available for download is inconsistent with the current statutory scheme. Second, they argue that requiring the Secretary of State to place the form online would usurp the Secretary's discretion. Finally, they argue that downloaded forms would be more prone to fraud and result in an increase in voter confusion.

The analysis of this issue is not really a matter of balancing under the Guare test. Rather, the issue is more directly addressed based on a straightforward statutory analysis. RSA 654:16 provides:

> Any person who has his domicile in any town or city in this state and is qualified to vote therein at the next subsequent election to be held in said town or city except for the fact that his name does not appear on the checklist to be used at the election, and who is temporarily absent therefrom or who by reason of physical disability is unable to attend a meeting of the supervisors of the checklist, may cause his name to be added to such checklist by applying to the city or town clerk or the secretary of state for a voter registration form provided for in RSA 654:7 and an appropriate absentee registration affidavit provided for in RSA 654:17.

(Emphasis added). Once a request has been made, "[t]he voter registration form and the absentee registration affidavit shall be forwarded directly to the applicant by the city or town clerk or by the secretary of state." RSA 654:18 (emphasis added).

Currently the Secretary of State's website only makes the absentee voter registration affidavit available for download. The absentee voter registration form itself is not available online. According to the offers of proof, voters seeking information on how to register by mail are directed by the Secretary of State to request absentee voter registration forms from their local city or town clerk. There does not appear to be any

means by which a voter can apply to the Secretary of State to receive these forms.

Pursuant to Part I, Article 11 of the New Hampshire Constitution, "[v]oting registration . . . shall be easily accessible to all persons including disabled and elderly persons who are otherwise qualified to vote." RSA 654:16 appears to be the state's implementation of this constitutional provision. Read together, RSA 654:16 and RSA 654:18 allow a person to apply to the Secretary of State for a voter registration form. The Secretary of State then must forward that form "directly to the applicant." RSA 654:18. Currently, that does not happen. In practice, the voter can only apply to the town clerk for a voter registration form and will only receive the voter registration form from the town clerk. If a person contacts the Secretary of State for the absentee registration form, the Secretary of State's office will direct that person to apply to the town clerk. That is not consistent with the statutory mandate and therefore justifies issuance of a writ of mandamus. See Guy, 131 N.H. at 747 (court may issue mandamus to compel a public official to perform a ministerial act required by law). The Court finds that the Secretary of State must take some action to permit voters to apply for voter registration forms from his office.

While it seems that the simplest implementation of this mandate would be to make the form available for download—as is already the case for the absentee voter registration affidavit—the defendants argue that having multiple versions of the registration form in circulation could create voter confusion. This explanation is unconvincing. The language of both the registration form and the absentee affidavit are dictated by statute and changes from time to time. In fact, HB 1266 amended both

forms. See 2020 N.H. Laws 14:2 and :3. Nonetheless, for some inexplicable reason the Secretary of State has made the affidavit freely available for download from his website but not the registration form itself.

Nonetheless, the Court agrees with the defendants that it is not in a position to order the Secretary of State to post the registration form online, as granting the plaintiffs' relief would require inserting language into the statute that does not exist. State statutes do not dictate how the Secretary of State must provide the form to the potential voter. Rather, RSA 654:18 says only that the Secretary of State shall "forward the form directly to the applicant." While providing the form on the Secretary of State's website for download might be the most convenient method, it is not legally required. In this regard the Secretary of State has discretion about how to fulfill his job and this Court is not in the position to make that policy judgment for him. While the court can compel him to make a decision required by law, the court cannot direct him to make a particular choice. See Rockhouse Mountain Prop. Owners Ass'n, Inc. v. Town of Conway, 127 N.H. 593, 602 (1986) ("When an official is given discretion to decide how to resolve an issue before him, a mandamus order may require him to address the issue, but it cannot require a particular result."); see also In re CIGNA Health Care, Inc., 146 N.H. at 687; Guy, 131 N.H. at 747.

As the defendants pointed out during the hearing, making the registration form freely accessible for download may have unintended consequences. Voters who are already properly registered to vote may submit another voter registration, resulting in additional work for town clerks, who are already facing significant additional burdens

with the expansion of absentee registration and voting in the wake of HB 1266. The Secretary of State's office may, for example, choose to check the voter registration itself before sending out an application. Alternative, the Secretary of State's website already lets voters check their own registration status. A voter could be required to determine if he or she was already registered in the proper district before submitting an application to the Secretary of State for an absentee voter registration form. This range of options must be left to the policy maker. Nonetheless, the Secretary of State must accommodate aspiring voters who contact his office for a registration form by developing a method to forward an absentee voter registration form directly to the applicant. The Secretary of State must comply with this mandamus promptly in light of the general election, which is only four weeks away.[1]

Thus, the plaintiffs' request for a preliminary injunction is GRANTED in part and the defendants' motion to dismiss this claim is DENIED. Requiring the Secretary to comply with his statutory obligation to forward the registration form to applicants will provide no risk of confusion to voters or undue burden on the defendants. Cf. Petition of the N.H. Sec'y of State, No. 2018-0208 (N.H. Oct. 26, 2018) (attached as Exhibit A to Defs.' Mem. Law in Supp. of Mot. to Stay) (granting stay of superior court order two weeks before the election because, inter alia, the injunction "creates both a substantial risk of confusion and disruption of the orderly conduct of the election"). To the contrary, providing voters an opportunity to get both the absentee registration form and affidavit

[1] As noted this Court's analysis is based on the plain language of the statute. The plaintiffs have not precisely made a statutory argument. Nonetheless, the Court finds that they are still entitled to relief applying the Guare test because the Secretary of State's explanation for not providing the registration forms directly to voters does not even pass rational basis scrutiny.

directly from the Secretary of State will facilitate the timely processing of absentee registration requests and reduce the potential confusion and burden faced by potential voters about how to get the appropriate forms. Thus, the defendants' motion to stay this issue is DENIED.

II. Documentation and Witness Requirements

The plaintiffs next argue that the absentee registration process unconstitutionally burdens voters. The absentee registration affidavit requires a new registrant to swear or affirm that, among other things, he or she has enclosed as proof of identity and domicile:

> (a) A copy of a current and valid New Hampshire driver's license or an armed services identification or other photo identification issued by the United States government that shows my name and address; or
>
> (b) A copy of a current and valid photo identification and a copy of a current utility bill, bank statement, government check, paycheck, other government document that shows my name and address, or a letter from the administrator of a nursing home or similar facility affirming that I am a resident of that facility that was provided to me at my request pursuant to the administrator's duty to provide such a letter upon my request.

RSA 654:17. HB 1266 allows new registrants to email copies photocopies or photographs of identification documents to the city or town clerk in lieu of mailing hard copies. 2020 N.H. Laws 14:3. Further, on June 3, 2020, the Secretary of State and Attorney General issued a joint memorandum in which they encouraged local election officials to take reasonable steps to accommodate individuals who lacked any of the required materials for registration or the means to submit them. Pls.' Mot. Prelim. Injunction Ex. 17. These accommodations include providing a Domicile and/or Qualified

Voter Affidavit to satisfy the proof requirements or conducting a video conference and viewing/witnessing the documents online. Id. at 3-4.

In addition to the affidavit, absentee registration applications must be witnessed by a third party who must swear to the following:

> I, _____, the undersigned witness, do hereby swear or affirm, under the penalties for voting fraud set forth below, that on the _____ day of _____, ___ (date), the above named, _____, having satisfied me as to his or her identity, signed the foregoing affidavit in my presence, and did before me swear to (or affirm) the truth of the statements therein contained.

RSA 654:17, II. This witness requirement may also be satisfied via an accommodation as noted above. Pls.' Mot. Prelim. Injunction Ex. 17 at 4.

"Ordinary and widespread burdens, such as those requiring 'nominal effort' of everyone, are not severe." Crawford, 553 U.S. at 205 (Scalia, J., concurring); id. at 198 (plurality opinion). Burdens are generally deemed severe where they outright exclude voters from the process. See, e.g., Dunn v. Blumstein, 405 U.S. 330, 337 (1972) (requirement that voter reside in state for one year and county for three months to register); Harper v. Virginia State Bd. of Elections, 383 U.S. 663 (1996) (poll tax); Davis v. Schnell, 81 F. Supp. 872 (S.D. Ala. 1949), aff'd, 336 U.S. 933 (1949) (literacy test); Thompson, 2020 WL 5742621, at *4 ("We noted in our stay order that at bottom, a severe burden excludes or virtually excludes electors or initiatives from the ballot.") (quotation and brackets omitted).

The witness and documentation requirements impose a burden on absentee voters, though the Court finds the burden is not severe. Cf. Crawford, 553 U.S. at 208 (Scalia, J., concurring). That being said, this Court cannot easily dismiss that burden as

reasonable, and therefore subject to the lowest level of scrutiny. By requiring absentee voters to submit three separate forms of verification, i.e., photo identification, voter affidavit, and witness verification, all of which serve the same basic purpose of ensuring voter eligibility, the Court finds the burden imposed is sufficient to trigger the intermediate level of scrutiny articulated in Guare. Therefore, the defendants 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.

The Court finds the defendants have met their burden here, at least with respect to the requirement to submit a government identification or a photo identification with documentation to establish the voter is who the person claims to be and lives where he or she claims to. "The Supreme Court and other courts have repeatedly emphasized that insuring that those who are permitted to vote are bona fide residents who share a community of interest with other citizens of the jurisdiction is a legitimate concern of the highest order." Opinion of the Justices, 171 N.H. 128, 142-43 (2018) (citing Dunn, 405 U.S. at 343-44; Carrington v. Rash, 380 U.S. 89, 91 (1965); Auerbach v. Rettaliata, 765 F.2d 350, 354-55 (2d Cir. 1985)); see also Luft v. Evers, 963 F.3d 665, 676 (7th Cir. 2020) ("Proof of residence helps assign voters to their proper districts and is valid for that reason alone."). The upcoming election is about more than the President of the United States; it will elect many local politicians throughout New Hampshire. "Insuring a community of interest among voters and residents promotes confidence in political outcomes and guards against a distortion of the political community." Opinion of the

Justices, 171 N.H. at 144.

> There is no question about the legitimacy or importance of the State's interest in counting only the votes of eligible voters. Moreover, the interest in orderly administration and accurate recordkeeping provides a sufficient justification for carefully identifying all voters participating in the election process. While the most effective method of preventing election fraud may well be debatable, the propriety of doing so is perfectly clear.

Crawford, 553 U.S. at 196 (Stevens, J., plurality opinion). "The mere possibility that the burden may be greater on a small subset of voters does not entitle the plaintiffs to the sweeping relief they seek here." DCCC v. Ziriax, 2020 WL 5569576, at *19 (N.D. Okla. Sept. 17, 2020).

While it is unclear whether all three security methods—photo ID, documentation, and affidavit—are necessary to meet the State's legitimate interests, the Court finds the current motion for preliminary injunction is not the proper mechanism for determining whether and to what extent the current regime could or should be changed. Even if the Court were to determine that the combined requirements imposed an unconstitutional burden on absentee voters in the face of the pandemic, striking down all three would leave no security measures in place and would undermine the public's confidence in the integrity of the electoral process on the eve of an election. The plaintiffs have provided this Court no guidance for determining which measure should survive and which is a step too far. This would require far more information than then Court currently has before it. For this reason, the plaintiffs have not shown a substantial likelihood of success on the merits that any one of the provisions should be struck down.

Most importantly, the plaintiffs have not presented a single affidavit identifying a

specific aspiring voter who has not been able to register to vote due to any one of the requirements (or even to the combination of the requirements). In other words, the plaintiffs have not identified a single person who does not have the proper documentation, cannot provide proof it to the town clerk, or cannot interact with a witness as required to verify the applicant's identification on the affidavit. This lack of evidence is particularly noteworthy given the hearing on the preliminary injunction occurred two weeks after the State's primary election on September 8, 2020. If there was a wide-spread inability of voters to register for the primary, the Court would have expected evidence of that during the hearing. Thus, even if the three-level security is cumbersome, this does not meet the high burden to enjoin enforcement of those provisions on a preliminary basis. See 43A C.J.S. Injunctions § 21. This is especially true since the defendants have not had the opportunity to marshal a full defense of these long-standing statutory requirements. In this regard, the plaintiffs have also failed to meet their burden to show a likelihood of success on the merits or an irreparable harm.

The Court is also mindful of two considerations regarding the timing of this request. First, it runs afoul of the principles articulated in Purcell v. Gonzalez, 591 U.S. 1 (2006). In that case, the United States Supreme Court stated that:

> Faced with an application to enjoin operation of voter identification procedures just weeks before an election, the Court of Appeals was required to weigh, in addition to the harms attendant upon issuance or nonissuance of an injunction, considerations specific to election cases and its own institutional procedures. Court orders affecting elections, especially conflicting orders, 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, 549 U.S. at 4-5. The plaintiffs' requested relief is precisely the type of last-minute change that Purcell is designed to prevent. Second, the potential for confusion and/or undermining of public confidence in the integrity of the electoral process is contrary to the public interest. See Petition of the N.H. Sec'y of State, supra (granting stay of preliminary injunction and applying the Purcell principles, noting, "We are not alone in declining to interfere with a fast-approaching election."); see also Thompson v. N.H. Bd. of Med., 143 N.H. 107, 108 (1998) (finding public interest must not be adversely affected by the granting of the preliminary injunction).

The very recently issued order in People First of Alabama v. Merrill, No. 2:20-cv-619-AKK, 2020 WL 5814455 (N.D. Ala. Sept. 30, 2020), highlights the importance of the timing of the complaint. In that case, the federal court struck down both a witness and photo ID requirement as unconstitutional, finding the burdens imposed on certain voters outweighed the state's justifications. Id. at *51, 53. However, the procedural history of that case is telling. The plaintiffs filed their complaint on May 1, 2020. Id. at *34. The plaintiffs moved for a preliminary injunction which the court granted in part on June 15, 2020. Id. The defendants immediately appealed to the Eleventh Circuit, which denied the defendants' motion for emergency stay. Id. at *35. The defendants then appealed to the United States Supreme Court, which granted the emergency stay on July 2, 2020. Id. The district court then held a ten-day bench trial from September 8 through September 18, 2020. Id.

As a result of the early commencement of the action in Merrill, the parties were able to conduct discovery and the court was able to receive testimony and evidence at a

proper trial, giving the court the opportunity to justify its injunction with specific factual findings. In contrast, the plaintiffs here did not file their complaint until mid-August, and did not file their motion for preliminary injunction until September 2, 2020. This Court was only able to receive facts via offers of proof at brief hearing on September 24, 2020. The defendants have objected to many of the factual assertions set forth in affidavits on a variety of grounds, including hearsay, improper opinion testimony, and other challenges the reliability of the plaintiffs' case. See, e.g., Defendants' Objections To Plaintiff's Offer Of Proof (Doc. 58). This severely handicapped both the Court's and the defendants' ability to adequately contemplate, analyze, and respond to the plaintiffs' claims. Therefore, even though there may be merit to the plaintiffs' case on the combined burden of the documentation and witness requirements, they waited too long to allow for a meaningful consideration of those issues.

Considering that the alleged burdens at issue here, such as the requirement of a photo ID, are not limited to the state of emergency occasioned by a pandemic, and have been in place for years, the plaintiffs could have brought this challenge long before they did. While the Court is sensitive to the fact that the pandemic has made those burdens substantially greater, the impact of the pandemic itself had been widely understood for nearly six months before the plaintiffs filed their motion for a preliminary injunction. The plaintiffs have not presented a satisfactory answer for why they delayed the challenge to the long-standing absentee registration process. Setting these provisions aside at this juncture would create more problems than they would solve.

In light of the absence of evidence that even a single voter has been prevented

from registering due to the challenged statutes, the plaintiffs' motion for a preliminary injunction is DENIED. The defendants' motion to dismiss this claim is DENIED. As noted, the plaintiffs have made a colorable claim that the combined effect of the three-part verification is unduly burdensome and unjustified, albeit one that does not meet the high threshold for a mandatory injunction. Because the preliminary injunction is denied, the Court will address this challenge in the ordinary course of litigation with proper discovery and a full evidentiary hearing. Given the short time before the election and the considerations set forth in the Purcell case, the Court will stay consideration of the merits of this claim until after the November 3, 2020 election.

III. Prepaid Postage

Plaintiffs argue that the requirement that absentee voters provide postage for their ballots burdens the right to vote. It appears that the overwhelming majority of courts that have addressed this issue conclude that requiring absentee voters to pay for postage constitutes a "reasonable, minimal, and nondiscriminatory restriction." League of Women Voters of Michigan v. Sec'y of State, ___ N.W.2d ___, 2020 WL 3980216, at *13 (Mich. Ct. App. July 14, 2020). "Postage is a type of 'usual burden[] of voting' and is not one that is imposed by the state in any event." DCCC, 2020 WL 5569576 at *22 (quoting Crawford, 553 U.S. at 197-98). As with the documentation requirement, the plaintiffs have not provided an affidavit from any specific voter who attests that they are unable to afford or obtain the requisite postage. Rather, they appear to rely entirely on the affidavit of their expert, Michael C. Herron, who states simply that postage is a cost of voting that may dissuade some from participating in the process. See Herron

Affidavit at ¶¶ 9, 35, 78, 166-93. Beyond identifying a number of states that do provide prepaid postage for absentee ballots, the plaintiffs have cited no law in support of their argument that postage imposes an unreasonable or severe burden on the right to vote. The court in DCCC found that the burden imposed by the postage requirement was "light," and this Court agrees. DCCC, 2020 WL 5569576 at *22. Indeed, this cost and burden is not more onerous than the one placed on a voter who must pay for the expenses of transportation to get to the polling place, including planning ahead to ensure that the voter has enough gas in the car to make it to the polls.

The plaintiffs also argue that because of the restrictions on ballot drop boxes and voter assistance, see infra, voting by mail is the only contactless form of voting available to New Hampshire residents. Therefore, the plaintiffs claim that the postage requirement constitutes a poll tax, contrary to Part I, Article 11 of the New Hampshire Constitution. The Court disagrees.

Courts addressing this issue under the federal constitution have found that "[p]ostage charged by the United States Postal Service—like the fee charged by any other courier or the bus fare for getting to the polls to vote in person—is not a tax prohibited by the Twenty-Fourth Amendment." Nielsen v. DeSantis, No. 4:20cv236-RH-MJF, 2020 WL 5552872, at * 1 (N.D. Fla. June 24, 2020).

> The fact that any registered voter may vote in Georgia on election day without purchasing a stamp, and without undertaking any "extra steps" besides showing up at the voting precinct and complying with generally applicable election regulations, necessitates a conclusion that stamps are not poll taxes under the Twenty-Fourth Amendment prism. In-person voting theoretically remains an option for voters in Georgia, though potentially a difficult one for many voters, particularly during a pandemic. The Court recognizes that voting in person is materially

> burdensome for a sizable segment of the population, both due to the COVID-19 pandemic and for the elderly, disabled, or those out-of-town. But these concerns—while completely justifiable and pragmatically solvable—are not the specific evils the Twenty-Fourth Amendment was meant to address.

Black Voters Matter Fund v. Raffensperger, No. 1:20-cv-01489-AT, 2020 WL 4597053 at *27 (N.D. Ga. Aug. 11, 2020), appeal filed (11th Cir. Sept. 9, 2020). The plaintiffs have offered no law to the contrary, relying entirely upon policy arguments.

In light of the foregoing, the Court finds the plaintiffs have failed to establish any basis to conclude that requiring voters who mail their absentee ballots to pay for postage constitutes a poll tax under Part I, Article 11 of the New Hampshire Constitution. As a result, the plaintiffs' request for a preliminary injunction is DENIED and the Court GRANTS the defendants' motion to dismiss this claim.

IV. Deadline

Pursuant to RSA 657:22, "[i]n any state election, a town or city clerk shall not accept any completed absentee ballots delivered to the clerk after 5:00 p.m. on election day except as provided in RSA 657:21-a, V and RSA 659:20-a."[2] The plaintiffs argue continued imposition of this deadline will result in the disenfranchisement of thousands of voters whose ballots arrive at the polls after the cutoff. See Herron Affidavit at ¶ 254 (predicting up to 7,000 ballots rejected in the general election).

"A generally applicable deadline that applied to all would-be absentee voters would likely survive the Anderson-Burdick analysis, even if it resulted in

[2] RSA 657:21-a allows for ballots submitted by emergency services workers to be accepted after the cutoff under certain circumstances. RSA 659:20-a allows voters who appear at a polling place to submit a ballot after the 5:00 p.m. deadline without having to enter the guardrail due to fear of COVID-19. See 2020 N.H. Laws 14:1, III.

disenfranchisement for certain . . . individuals." Mays v. LaRose, 951 F.3d 775, 792 (6th Cir. 2020); Cf. Obama for America v. Husted, 697 F.3d 423, 433-34 (6th Cir. 2012) ("If the State had enacted a generally applicable, nondiscriminatory voting regulation that limited in-person early voting for all Ohio voters, its 'important regulatory interest' would likely be sufficient to justify the restriction."). "As the Tenth Circuit has observed, any deadline 'will invariably burden some voters . . . for whom the earlier time is inconvenient,' but these burdens are assessed in light of 'a state's legitimate interest in providing order, stability, and legitimacy to the electoral process.'" DCCC, 2020 WL 5569576, at *19 (quoting Utah Republican Party v. Cox, 892 F.3d 1066, 1077 (10th Cir. 2018)).

At the hearing, the defendants explained that the 5:00 p.m. deadline essentially serves as a time buffer to allow certain administrative practices to play out before the polls close. Specifically, the defendants explained that the city and town clerks collect the absentee ballots at 5:00 p.m. and deliver them to the moderator. The ballots are then processed so they may be counted along with the in-person ballots once the polls close. The defendants further articulated the ripple effect that a preliminary injunction would have on the electoral process, explaining that a significant number of statutes relating to the receipt, processing, and counting of absentee ballots are intertwined. See, e.g., RSA 659:47, :50-:53, :58, :62, :63, :70, :76. Interfering with the timing of this process necessarily implicates other deadlines, such as the requirement that recounts be requested by the Friday following the election. See RSA 660:1.

In terms of the burden imposed on the right to vote, the Court finds the 5:00 p.m.

cutoff falls under the lowest level of scrutiny in the Anderson-Burdick formula. "Deadlines are inherently arbitrary," United States v. Boyle, 469 U.S. 241, 249 (1985), and the one at issue here is not unreasonable. See Grossman v. Sec'y of the Commonwealth, 151 N.E.3d 429, 438 (Mass. 2020) (applying rational basis test and finding election day deadline is reasonable in light of other statutory deadlines that must be met). Cf. Marston v. Lewis, 410 U.S. 679, 680 (1973) (in upholding cut-off for voter registration 50 days before an election, the Court noted, "a person does not have a federal constitutional right to walk up to a voting place on election day and demand a ballot. States have valid and sufficient interests in providing for some period of time—prior to an election—in order to prepare adequate voter records and protect its electoral processes from possible frauds"). Voters have ample time to request, complete, and return their registrations and/or ballots prior to the election. Cf. Rosario v. Rockefeller, 410 U.S. 752, 758 (1973) ("[I]f their plight can be characterized as disenfranchisement at all, it was not caused by [the challenged state law], but by their own failure to take timely steps to effect their enrollment."). Those who wish to do so may physically drop their ballots off with their town or city clerk, either before the election or on election day up to the time the polls close. RSA 659:20-a allows voters who appear at a polling place to submit a ballot after the 5:00 p.m. deadline if they declare under oath that they are unable to access a polling place due to disability. This has been extended to anyone concerned about entering the polling place due to COVID-19. 2020 N.H. Laws 14:1, III ("Notwithstanding any law of the contrary, any voter who, due to extenuating circumstances under Covid-19 is attempting but unable to access the polling place on

the day of an election may follow the provisions set forth in RSA 659:20-a."). Thus, Court is not convinced that the burden imposed by COVID-19 has significantly increased the impact of the 5:00 p.m. deadline so as to elevate the level of scrutiny beyond the rational basis review. For these reasons, the Court finds that the plaintiffs have not made out a claim that the 5:00 p.m. deadline violates their voting rights under the Guare balancing test. Accordingly, the defendants' motion to dismiss this claim is GRANTED.

The plaintiffs further argue the deadline violates voters' due process rights as guaranteed by Part I, Article 15 of the New Hampshire Constitution. In doing so, the plaintiffs advocate for the application of the test articulated in Mathews v. Eldridge, 424 U.S. 319 (1976). Under that test, the Court must balance three factors: (1) the private interest that will be affected by the official action; (2) the risk that the procedures used will cause an erroneous deprivation, and the probative value of any additional or substitute procedural safeguards; and (3) the government's interest, including any fiscal and administrative burdens. Mathews, 424 U.S. at 334-35. The defendants argue the Court should instead evaluate this claim under the same Anderson-Burdick balancing test applied above.

The plaintiffs' reliance on Saucedo v. Gardner, 335 F. Supp. 3d 202 (D.N.H. 2018), in their pleadings is misplaced. Although the district court in that case did apply the Mathews test, the statute at issue was notably different from the delivery cutoff at issue here. In Saucedo, the plaintiffs were challenging a law that allowed moderators to reject absentee ballots if the signature on the absentee ballot application and the

signature on the affidavit accompanying the ballot did not match. Ultimately finding that the statute failed the Mathews test, the court noted that "[t]he infirmity with the statute begins with vesting moderators with sole, unreviewable discretion to reject ballots due to a signature mismatch." Saucedo, 335 F. Supp. 3d at 222.

Here, as argued by the defendants, there is no discretion in RSA 657:22. The deadline to submit ballots is a policy decision set by the legislature. Therefore, the plaintiffs are "not entitled to procedural due process above and beyond that which already is provided by the legislative process." 75 Acres, LLC v. Miami-Dade Cty., Fla., 338 F.3d 1288, 1293 (11th Cir. 2003). To the extent a due process issue exists here, it would be substantive rather than procedural. In that case, it would be subject to the Anderson-Burdick balancing test. See Dudum v. Arntz, 640 F.3d 1098, 1106 n.15 (9th Cir. 2011) (finding Supreme Court has addressed First Amendment, Due Process, and Equal Protection claims "collectively using a single analytic framework," i.e., Anderson-Burdick); Husted, 697 F.3d at 430 (finding Anderson-Burdick represents "a single standard for evaluating challenges to voting restrictions"); see also Arizona Democratic Party v. Hobbs, No. CV-20-1143-PHX-DLR, 2020 WL 5423898, at *11 (D. Ariz. Sept. 10, 2020) ("The cases cited by the State, then, might be best understood as placing all *substantive* due process and equal protection challenges to election regulations under the Anderson/Burdick framework."), appeal filed (9th Cir. Sept. 11, 2020). Therefore, the Court finds the plaintiffs have failed to set forth a due process claim. Accordingly, the plaintiffs' motion for a preliminary injunction on this issue is DENIED and the defendants' motion to dismiss this claim is GRANTED.

V. Drop Boxes

The plaintiffs argue that the August 19 Election Operations memorandum, which gives local election officials the option to set out drop boxes in which voters can deposit their absentee voting materials, places a severe burden on the right to vote because it also requires that said drop boxes be staffed by a properly trained election official. The Court is entirely unpersuaded. As argued by the defendants, the drop boxes represent an accommodation for voters, as they expand the number of available delivery methods for absentee ballots. While the plaintiffs may wish that the state had provided more permissive guidance and allowed the use of unmanned drop boxes, it is unclear to the Court how an expansion of the right to vote can constitute a burden on that same right, simply because it may not go as far as the plaintiffs desire. The Court finds the plaintiffs have failed to articulate a claim with respect to the state's guidance regarding drop boxes. Accordingly, the defendants' motion to dismiss this claim is GRANTED.

VI. Voter Assistance Ban

New Hampshire law places limitations on the third parties that can mail or deliver an absentee ballot on the voter's behalf. RSA 657:17 permits a "delivery agent" to assist a disabled voter by mailing the absentee ballot or delivering it to the city or town clerk. As defined in that statute, a "delivery agent" is restricted to:

> (a) The voter's spouse, parent, sibling, child, grandchild, father-in-law, mother-in-law, son-in-law, daughter-in-law, stepparent, stepchild; or
>
> (b) If the voter is a resident of a nursing home as defined in RSA 151-A:1, IV, the nursing home administrator, licensed pursuant to RSA 151-

> A:2, or a nursing home staff member designated in writing by the administrator to deliver ballots; or
>
> (c) If the voter is a resident of a residential care facility licensed pursuant to RSA 151:2, I(e) and described in RSA 151:9, VII(a)(1) and (2), the residential care facility administrator, or a residential care facility staff member designated in writing by the administrator to deliver ballots; or
>
> (d) A person assisting a blind voter or a voter with a disability who has signed a statement on the affidavit envelope acknowledging the assistance.

RSA 657:17, II. The plaintiffs argue that the restriction on who can deliver absentee ballots places a significant burden on voters, specifically disabled voters and those particularly vulnerable to COVID-19.

In fact, the Court is not persuaded that New Hampshire statutes regulating who can deliver a ballot for another person even impose a burden on a voter. A review of the legislative history of RSA 657:17 demonstrates that the New Hampshire Legislature has actually expanded the avenues for a voter to seek assistance over the years. As originally enacted, absentee and disabled voters could only vote by mail. 1979 N.H. Laws 436:1. Over time, the legislature has given voters more options, including allowing family members and employees of nursing homes and residential care facilities to deliver ballots. 2015 N.H. Laws 166:1; 2019 N.H. Laws 261:1. As noted above, the expansion of voting opportunities is not a burden on the right to vote. See Crawford, 553 U.S. at 209 (Scalia, J., concurring).

Even if the limitations on delivery agents found in RSA 654:17 are a burden on some voters, courts have found laws limiting ballot harvesting and delivery assistance "constitute no more than a minimal burden on a voter's right to vote." DCCC, 2020 WL

5569576, at *12. All eligible voters are allowed to vote in person or by mail. Although the law permits only the voter or a person assisting a blind or disabled voter to deliver an absentee ballot, see RSA 657:17, I, nothing in the law prevents a friend from buying a postage stamp for a voter. The voter can then affix the stamp and drop the absentee ballot in the mailbox without any risk of exposure to COVID-19 or additional obstacle. The plaintiffs have failed to articulate how these minimal steps impose any greater impediment on an absentee voter than the ordinary burdens faced by voters who choose to cast their ballot in person on election day.

The defendants have cited a number of courts that have found absentee ballots to be inherently more susceptible to voter fraud. See, e.g., Crawford, 553 U.S. 181, 195-96 & n.13; Texas Democratic Party, 961 F.3d at 414 (Ho, J., concurring); Veasey v. Abbott, 830 F.3d 216, 263 (5th Cir. 2016) (en banc); Marks v. Stinson, 19 F.3d 873, 888-89 (3d Cir. 1994). Measures similar to RSA 654:17 have been found to safeguard ballots from tampering by third parties, as well as safeguard the election process by reducing the potential for fraud. See Qualkinbush v. Skubisz, 826 N.E.2d 1181, 1199 (Ill. Ct. App. 2004) (also finding the burden imposed by such measures to be "slight and . . . nondiscriminatory"). While the plaintiffs claim that the defendants have no evidence of widespread voter fraud, the law does not require such specific evidence. See Crawford, 553 U.S. at 196-97; DCCC, 2020 WL 5569576, at *20. The plaintiffs assert the lack of evidence of voter fraud is proof that the measures are unjustified. It is, however, just as likely that the dearth of evidence regarding voter fraud in New Hampshire may be a testament to the efficacy of long-standing laws in this state design

to protect the integrity of the election. Accordingly, the Court finds the defendants have articulated important regulatory interests that are sufficient to justify the restrictions on voter assistance. See Guare, 167 N.H. at 663.

The plaintiffs also argue the voter assistance ban violates their election-related speech and association rights guaranteed by Part 1, Article 22 of the New Hampshire Constitution. The Court disagrees. As noted by the defendants, numerous courts have concluded that the practice of collecting and delivering absentee ballots is not expressive conduct implicating the First Amendment. See Knox v. Brnovich, 907 F.3d 1167, 1181-82 (9th Cir. 2018); Feldman v. Arizona Sec'y of State's Office, 843 F.3d 366, 392-93 (9th Cir. 2016); Voting for Am., Inc. v. Steen, 732 F.3d 382, 391-93 (5th Cir. 2013). The cases the plaintiffs cite to the contrary are largely inapposite, as they involve conduct beyond the ministerial act of delivering a ballot or placing it in the mail on behalf of someone else. See Priorities USA v. Nessel, 2020 WL 2615766, at *11 (E.D. Mich. May 22, 2020) (finding political speech where plaintiffs wish to "deploy staff and volunteers to . . . educate . . . voters about their options to use and request absent voter ballot applications [and] . . . distribute absent voter ballot applications" in addition to collecting and mailing ballots); Meyer v. Grant, 486 U.S. 414 (1988) (use of paid circulators to collect signatures for an initiative petition); League of Women Voters v. Hargett, 400 F. Supp. 3d 706, 720 (M.D. Tenn. 2019) (voter registration drives and "encouraging citizens to register to vote"); Am. Ass'n of People with Disabilities v. Herrera, 690 F. Supp. 2d 1183 (D.N.M. 2010) (restrictions on voter registration activities of third-party organizations). Therefore, the Court finds the voter assistance restrictions

do not violate the plaintiffs' constitutional rights.

For the foregoing reasons, the plaintiffs' motion for a preliminary injunction on the voter assistance ban is DENIED and the defendants' motion to dismiss is GRANTED.

VII. Equal Protection

As a final matter, the plaintiffs argue the absentee registration process, documentation requirement, and election-day receipt deadline collectively violate the equal protection clause of the New Hampshire Constitution. Specifically, the plaintiffs argue that different cities and towns provide different procedures for absentee registration and voting, and that the challenged procedures impose disparate burdens on students, low-income, and transient voters. However, the Court finds it need not address this claim. "The Supreme Court in Anderson explicitly imported the analysis used in equal protection cases to evaluate voting rights challenges brought under the First Amendment, thus creating a single standard for evaluating challenges to voting restrictions." Husted, 697 F.3d at 430 (citation omitted). "The Supreme Court confirmed this approach in Crawford by directly connecting its equal protection voting rights jurisprudence in Harper v. Va. Bd. of Elections, 383 U.S. 663 (1966), with Anderson and Burdick, and finally applying the standard derived from those cases to a state statute allegedly burdening the right to vote." Id. New Hampshire has adopted this approach. See Libertarian Party New Hampshire v. State, 154 N.H. 376, 384 (2006) ("[W]e conclude that the balancing test we adopted in Akins is the appropriate test to apply to this equal protection challenge.").

Therefore, the Court finds that the Anderson-Burdick balancing test applies to the plaintiffs' equal protection claim. As the Court has already found the plaintiffs have failed to establish a likelihood of success on the merits under this test, their equal protection claim must likewise fail.

Conclusion

The plaintiffs' motion for preliminary injunction is GRANTED with respect to its request to compel the Secretary of State to comply with the terms of RSA 654:16 and RSA 654:18, and DENIED in all other respects. The defendants' motion to dismiss is GRANTED in part and DENIED in part, consistent with the foregoing. As a result of the above findings, the defendants' motion for a stay is GRANTED, in part, and DENIED, in part, as set forth above.

October 2, 2020
Date

Judge N. William Delker

Clerk's Notice of Decision
Document Sent to Parties
on 10/02/2020